Supreme Court, U.S.
FILED
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No.

In the

Supreme Court of the United States

KIM D. FIORIGLIO,

Petitioner,

v

CITY OF ATLANTIC CITY; JAMES WHELAN; PAUL GALLAGHER; BENJAMIN BRENNER; TERRENCE MOONEY; DENNIS BROOKS; ATLANTIC CITY FIREFIGHTERS' LOCAL 198; JOSEPH RUSH; JOHN DOE (S) 1-50, fictitious name(s) as individuals; ABC CORPORATION (S), 1-50 fictitious name (s) as corporations and/or entities, i/j/s/a

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE PETITIONER ESTABLISHED THAT THE COURT HAD ERRONEOUSLY GRANTED SUMMARY JUDGMENT SINCE THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH THE NEXUS BETWEEN POLITICAL RETALIATION AND FIRST AMENDMENT VIOLATIONS?

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The decision of the United States Court of Appeals for the Third Circuit is set forth in the Appendix, p. 1a and reproted at 185 F 3d 861. The opinions of the United States District Court for the District of New Jersey dated March 5, 1998 and May 6, 1997 and is set forth in the Appendix, p. 2a and p. 32a and are reported at 996 F. Supp 379 and 963 F. Supp 415.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Third Circuit issued its denial for Fioriglio's petition for rehearing. This Petition was timely filed within 90 days of the denial, and is thus timely.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

42 U.S.C. Section 1983, Civil Rights

Section 1983. Civil Action for Deprivation of Rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage...subjects, or causes to be subjected,...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

42 U.S. C. Section 1985, Title VII of the Civil Rights Act of 1964

Section 1985. Conspiracy to interfere with civil rights.

> (1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties...

42 U.S.C. Section 2000e-2 – Equal Employment Opportunities

Section 2000e. Definitions.

> ...(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; ...

First Amendment of the Constitution of the United States

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

At the onset, the Petitioner stresses the importance of the issues in this case --- to clarify the standard for burden of proof to prove that first amendment rights were violated because of political retaliation.

The Petitioner, Kim D. Fioriglio, took an exam administered by the New Jersey Department of Personnel to be promoted as battalion fire chief in the city of Atlantic City. The examination consisted of a written section and an oral section. The Petitioner completed the written portion of the examination on September 22, 1990 and completed the oral portion on November 21, 1991. On February 6, 1992, the exam results were posted and he was ranked number one on the eligibility list from which promotions to battalion chief are made.[1]

By April 26, 1993, the Petitioner was in a three-way tie at the top of the promotion list.

In February of 1994, the Petitioner announced that he was running for the Mayor of Atlantic City, a position held by James Whelan. In an election held on May 12, 1994, Whelan defeated the Petitioner for the mayoral seat. During the campaign, the Petitioner revealed damaging facts regarding the mayor.

On December 1, 1994, Whelan promoted another individual, not the Petitioner, for the battalion fire chief position.

On January 17, 1995, the Petitioner filed a complaint with the New Jersey Department of Personnel and the Public Employment Relations Commission alleging that the City's refusal to promote him was the direct result of "discriminatory and retaliatory motives".

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[1] After the exam was conducted, the State of New Jersey changed the scoring method, and the Mayor of a City would have to choose from one of the tope three eligible – "Rule of Three". The new scoring method effected the Petitioner's ranking.

On May 9, 1996, the Petitioner filed a complaint in the United States District Court for the District of New Jersey against city officials alleging that the latter conspired against him and violated his free speech rights under the federal and state constitutions. In particular, the Petitioner alleged that the city officials denied him a promotion to battalion chief in retaliation for his mayoral campaign against Whelan.

On March 5, 1998, the District Court granted the defendants' Motion for Summary Judgment and then on April 4, 1998, the District Court denied the Petitioner's Motion for Relief under Rule 60(b).

The Petitioner filed a Notice of Appeal to the United States Court of Appeals of the Third Circuit. The Court of Appeals denied the Petitioner's request for rehearing.

The Petitioner has filed a Petition for Certiorari based upon the issues and argument presented herein.

ARGUMENT

I. THE PETITIONER ESTABLISHED THAT THE COURT HAD ERRONEOUSLY GRANTED SUMMARY JUDGMENT SINCE THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH THE NEXUS BETWEEN POLITICAL RETALIATION AND FIRST AMENDMENT VIOLATIONS.

A. Evidence of violations of freedom of speech was sufficient to overcome the summary judgment standard.

Summary Judgment should have never been granted since there were genuine issues of material facts. *Jefferson Bank v. Progressive Casualty Insurance Co.*, 965 F.2d 1274, 1278 (3rd Cir. 1992); F.R.C.P. 56(c). All reasonable inferences must be drawn in favor of the non-movant. *Meyer v. Riegel Prods. Corp.*, 720 F.2d 303, 307 n.2 (3rd Cir. 1983).

The Petitioner's case should have never been disposed of upon a motion for summary judgment. Determinations of motive and intent, particularly in discrimination cases are questions better suited for the jury. *Petitti v. New England Telephone and Telegraph Co.*, 909 F.2d 28, 34 (1st Cir. 1990). Obviously, the city officials' motive and intent were central issues to the underlying cause of action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Employment discrimination cases should be disposed of at summary judgment only with "extreme caution". *See Beard v. Annis*, 730 F.2d 741, 743 (11th Cir. 1984).

Discrimination can be proved with direct or indirect evidence. *Meeks v. Computer Data Association International*, 15 F.3d 1013, 1019 (11th Cir. 1994). During the limited discovery that was allowed against the city officials and by the Petitioner's own testimony, the Petitioner demonstrated the continuous comments the city officials made against him and how they changed local rules in order to prevent him from being promoted to fire battalion chief, when he was ranked first on the list. The Petitioner was not promoted because he enforced his first amendment rights to freedom of speech.

The Petitioner submitted sufficient circumstantial evidence to meet his burden of proof. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the Supreme Court established the standard necessary for the Petition to meet his burden of proof with respect to his discrimination allegations. The Court stated that in order to establish a prima facie case of discriminatory treatment under the evidentiary framework in Title VII of the Civil Rights Act of 1964 cases, the plaintiff must prove that: (1) he/she belongs to a racial minority; (2) he/she applied and was qualified for a job for which the employer was seeking applicants; (3) despite the plaintiff's qualifications, the plaintiff was rejected; and (4) after such rejection, the position remained open and the employer continued to seek applicants from persons of the plaintiff's qualifications. Once the plaintiff has met this initial burden, the burden of production shifts to the employer to articulate some legitimate,

nondiscriminatory reason for the plaintiff's rejection; if the trier of facts finds that the elements of the prima facie case are supported by a preponderance of the evidence and the employer remains silent, then the court must enter judgment for the plaintiff. *Id.*

The Petitioner was in the minority of not supporting the mayor for reelection. Obviously, the Petitioner was the most qualified for the position since he ranked first after the exam. However, the mayor changed the hiring process just so that he did not have to promote the Petitioner, and, in fact, hired two other people who did not score as high as the Petitioner. The mayor and the city officials refrained from making any hiring decisions until they could change the law just because of the Petitioner's political beliefs – that is, political discrimination and infringement upon First Amendment rights (freedom of speech).

The central issue is what evidence is sufficient to support this type of discrimination. The Supreme Court has recognized that a public employee who alleges that he was discharged or threatened with discharge solely because of his partisan political affiliation states a viable claim under 42 U.S.C. Section 1983 and that his First Amendment rights have been violated. *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). These cases have been extended to facts concerning promotions and hiring decisions. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.ed.2d 52 (1990); *McClintock v. Eichelberger*, 169 F.3d 812 (1999), cert. denied, __ S.Ct. ___, 68 USLW 3106 (1999). It is clear that the government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially his...freedom on speech. *Id.*

The Petitioner submitted sufficient evidence to show the nexus that the mayor changed the promotion process in order to refrain from promoting the Petitioner. Moreover, the Petitioner submitted evidence to demonstrate remarks the mayor and other city officials made during and after the hiring process. A

citizen's right not to support a political candidate is every bit as protected as his right to support one, and thus a public employee can bring a claim of political discrimination when an employer takes an adverse employment action because she does not want to fill employment positions that would otherwise be available to his or her supporters. *Stephens v. Kerrigan*, 122 F.3d 1971 (1997). To make out a prima facie case of political discrimination, a public employee who claims that they suffered an adverse employment action based on their exercise of constitutional right must show that they worked for a public agency in a position that does not require political affiliation, that they were engaged in constitutionally protected conduct, and that conduct was a substantial or a motivating factor in government's employment decision. *Id.*

B. Political discrimination cases must not have different standards of burden of proofs than other employment discrimination cases.

The Third Circuit has stated that once a public employee makes out a prima facie case of political discrimination, an employer may avoid finding of liability by proving by a preponderance of evidence that same employment action would have been taken even in absence of the protected activity. *Id.* This shift of burden of proof is different from the *McDonnell Douglas* discrimination test and also makes it easier for the defendant to escape liability. A political discrimination case also employs similar, but not identical, burden-shifting mechanisms as those used in other employment discrimination contexts, such as Title VII cases. *See Acevedo-Diaz v. Aponte*, 1 F.3d 62, 66 (1st Cir. 1993). Why is political discrimination being treated differently?

See Armbruster v. Unisys Corp., 32 F.3d 768 (1994) (the Third Circuit Court of Appeals held that both burden of production and risk of nonpersuasion are shifted to the defendant who because of inference permitted by other evidence showing employee's bias, must persuade fact finder that even if discrimination was the

motivating factor in an adverse employment decision, the employer would have made the same employment decision. A defendant can no longer be able to completely escape liability for age discrimination by showing it would have made same decision regardless of consideration of discriminatory factor). Therefore, this Court must extend and compare the age discrimination analysis to political discrimination.

Why should one type of discrimination, especially in employment-type settings, be treated differently and have different burdens of proof and persuasion?

The Petitioner submitted the evidence of political discrimination from the onset. *DeLong v. Hampton*, 422 F.2d 21 (1970). Thus, he met his burden of proof and summary judgment was improperly granted. If the Petitioner's political affiliation was a substantial or motivating factor in the mayor and city officials' decision not to promote him, then, the Petitioner has established a basis for finding the requisite causation. *Robertson v. Fiore*, 62 F.3d 596, 599 (3rd Cir. 1995). The Petitioner submitted substantial evidence to discredit any proffered reason that discrimination was more likely than not a motivating or substantial cause of the adverse action. *See Fuentes v. Perskie*, 32 F.3d 759, 764 (3rd Cir. 1994); *Torre v. Casio, Inc.*, 42 F.3d 825, 830 (3rd Cir. 1994). If the city officials allege that they hired a black minority person instead of him, the Petitioner can justify a cause of action for reverse discrimination since he was more qualified for the position.

Summary judgment was improperly granted. The lower courts are unsure how to weigh evidence of political discrimination cases versus other employment discrimination cases. The role of this Court is to establish a uniformity as to the burden of proofs and persuasion in a political discrimination case.

Discrimination exists "in forms as myriad as the creative perverseness of human beings can provide. *McCorstin v. United States Steel Corp.*, 621 F.2d 749, 753-54 (5th Cir. 1980). The Petitioner was discriminated against due to his spoken political

beliefs during a mayoral campaign. He was discriminated against because of his enforcement of his First Amendment rights.

Therefore, the Petitioner must be given the opportunity to enforce his constitutional rights and be treated equally under the laws.

CONCLUSION

The Court should grant *certiorari* to review this important issue; reverse the Third Circuit; and order that the District Court allow the Petitioner to proceed with further discovery.

Respectfully Submitted,
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Kim D. Fioriglio

v.

City of Atlantic City, James Whelan, Paul Gallagher, Benjamin Brenner, Terrence

Mooney, Dennis Brooks, Atlantic City Firefighters' Local 198, Joseph Rush, John

Doe(s) 1-50, Fictitious Name(s) as Individuals, ABC Corporation(s), 1-50

Fictitious Name(s), as Corporation and/or Entities, i/j/s/a

NO. 98-5240

United States Court of Appeals,

Third Circuit.

June 08, 1999

Appeal From: D.N.J.,No.96-cv-02295, Irenas, J.,

Affirmed.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. The Third Circuit provides by rule for the reporting of opinions having "precedential or institutional value. An opinion which appears to have value only to the trial court or the parties is ordinarily not published." The Federal Reporter tables are prepared from lists of cases terminated by judgment orders, unpublished per curiam opinions and unpublished signed opinions, indicating the disposition of each case, transmitted by the Court. Third Circuit Rules, App. 1, Internal Operating Procedures, Ch. 5, sec. 5.1, 28 U.S.C.A.)

JIM D. FIORIGLIO, Plaintiff, v. CITY OF ATLANTIC CITY, JAMES WHELAN, PAUL GALLAGHER, BENJAMIN BRENNER, and JOSEPH RUSH, Defendants.

CIVIL ACTION NO. 96-2295 (JEI)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

March 5, 1998, Decided

March 5, 1998, Filed

COUNSEL:
For Plaintiff: M. Daniel Perskie, Esq., PERSKIE & WALLACH, Northfield, N.J.

For City of Atlantic City, Defendant: Matthew Wieliczko, Esq., ZELLER & BRYANT, Cherry Hill, N.J.

For James Whelan, Defendant: David F. Corrigan, Esq., MURRAY, MURRAY & CORRIGAN, Little Silver, N.J.

For Paul Gallagher, Defendant: JOHN H. ROSENBERGER, ESQ., Linwood, N.J.

For Benjamin Brenner, Defendant: John M. Donnelly, Esq., Brian J. Cullen, Esq., LEVINE, STALLER, SKLAR, CHAN, BRODSKY & DONNELLY, Atlantic City, N.J.

For Joseph Rush, Defendant: Catherine Tuohy, Esq., TUOHY & TUOHY, Atlantic City, NJ.

JUDGES:
JOSEPH E. IRENAS, U.S.D.J.

OPINIONBY:

JOSEPH E. IRENAS

OPINION:

[*381] OPINION

IRENAS, District Judge:
This matter appears before the Court upon the motion for summary judgment of defendants Atlantic City Mayor James Whelan ("Whelan"), Atlantic City Fire Chief Benjamin Brenner ("Brenner"), Atlantic City Solicitor Paul Gallagher ("Gallagher") and the City of Atlantic City on **[**2]** plaintiff Kim Fioriglio's ("Fioriglio") *42 U.S.C. § 1983* civil conspiracy claim, state constitutional claim, tortious interference with contractual advantage claim and New Jersey Conscientious Employees Protection Act ("CEPA"), N.J.S.A. 34:19-1 et seq., claim. Because the Court finds that plaintiff has failed to present any facts under which he could succeed on these claims, the Court will grant the defendants' motions' on all of the claims and dismiss plaintiff's case in its entirety.

I. BACKGROUND
On September 22, 1990, plaintiff took a written examination given by the New Jersey Department of Personnel ("NJDOP") for the position of Battalion Fire Chief for the City of Atlantic City. Pl. Compl. at P 13. The NJDOP then administered an oral assessment examination of plaintiff on November 21, 1991. Pl. Compl. at P 14. n1 This oral assessment examination is also calculated into a candidate's test score for Battalion Chief. Id. After these examinations, the NJDOP posted the exam results and plaintiff **[*382]** had received the highest score, ranking him number one on the promotion eligibility list. See NJDOP Certification of Eligibility, Fire Battalion Chief, 9/22/90 Examination **[**3]** Results, Exh. K to Pl. Br. Several candidates questioned their scores and appealed the grading of the test. Pl. Br. at 1. An NJDOP test expert, in accordance with a Consent Decree which obligated the NJDOP to review the fire department's selection process for ranks above firefighter to ensure no adverse impact on black and

Hispanic applicants, see *United States v. State of New Jersey, 473 F. Supp. 1199 (D.N.J. 1979),* considered these appeals and determined that the examination would have to be rescored. See *Fioriglio v. New Jersey Dep't of Personnel, 1996 U.S. Dist. LEXIS 15399,* Civ. A. No. 96-3342(JEI), *1996 WL 599400,* at *1 (D.N.J. Oct. 15, 1996) (related case before this Court).

While the appeals were still pending, Mayor Whelan, on November 9, 1992, issued a memorandum which set forth the criteria to be considered in the event of a tie between candidates for Battalion Chief. Exh. C to Pl. Br. City residency was to be **[**4]** the first tie-breaking criteria and ranking on prior tests was to be the second tie-breaking criteria. Id. The Mayor indicated that these criteria had been utilized in deciding past ties in the police department. Id.

On November 20, 1992, the NJDOP posted the results of the rescored Battalion Chief examination and plaintiff's score placed him in a four-way tie for sixth place with Dennis Brooks ("Brooks"), Terrence Mooney ("Mooney") and Daniel Tamburilla ("Tamburilla"). Pl. Compl. at P 21. In the period between November 20, 1992, and April 26, 1993, a number of Atlantic City Fire Captains were promoted to Battalion Chief, leaving plaintiff and the other three men in a tie for the next available promotion. Pl. Br. at 1. Then, on April 26, 1993, Brooks was promoted to the rank of Battalion Chief in accordance with the Atlantic City's veteran's preference policy. Thus, plaintiff now faced a three way tie with Mooney and Tamburilla. See Deposition of Benjamin Brenner, Exh. J to Pl. Br., at 38 [hereinafter Brenner Dep.]. Of these three candidates, plaintiff was the only city resident. Pl. Compl. at P 29.

On February 1, 1994, plaintiff decided to run for Mayor of Atlantic **[**5]** City against the incumbent Mayor, defendant Whelan. Pl. Compl. at P 22. Plaintiff alleges that he ran a vigorous campaign in which he heavily criticized Mayor Whelan's administration. Pl. Br. at 1. In his written campaign materials, plaintiff alleged that Mayor Whelan used his position as Mayor to

hire political "cronies" to key governmental positions in order to gain political favor, that he hired incompetent persons, and that he created unnecessary and duplicative positions in the city government which then were given out to political friends and allies as a reward for political support. Pl. Compl. at P 24; see Fioriglio Campaign Literature, Exh. G to Pl. Br. [hereinafter Campaign Literature]. Plaintiff also accused the Mayor of suppressing information at city council meetings and misusing tax monies. See Campaign Literature.

Plaintiff has accused Mayor Whelan of making various comments about his campaign for Mayor and the Mayor's alleged intention not to promote plaintiff. He claims the Mayor was overheard saying "F--ck you, F--ck you, you fireman and f--ck that Fioriglio, he will never be Mayor," Recorded Statement of Fire Inspector Scott McKnight, 5/28/96, Exh. M to **[**6]** Pl. Br., and "Kim would never be promoted as long as [I am] Mayor," Recorded Statement of Firefighter Wayne Gottwalls, 8/02/96, Exh. N to Pl. Br. He also claims the Mayor told another fire captain, "you firemen always want something and you go and support that asshole Fioriglio for Mayor against me and then you think I am going to give an appointment." Recorded Statement of James Boyer, 9/04/96, Exh. O to Pl. Br. As proof of these comments, he attempts to submit three unsigned, unsworn transcripts of tape recorded statements supposedly made by two firefighters and one fire captain who claim that the Mayor spoke out against plaintiff. Plaintiff allegedly tape recorded these statements and then transcribed them for the Court. However, none of the statements are sworn to or signed by the alleged speakers. Furthermore, neither plaintiff nor his attorney has submitted an affidavit attesting to the transcripts' validity.

[*383] On May 12, 1994, Mayor Whelan was elected to his second term. Pl. Compl. at P 25. Plaintiff received fewer than 200 votes in the election. See Sept. 19, 1997 Deposition of Kim Fioriglio, Exh. C to the Certification of Brian J. Cullen, at p. 58 [hereinafter Fioriglio **[**7]** Sept. 19 Dep.].

On October 4, 1994, Mooney was given a temporary promotion to Battalion Chief. Plaintiff allegedly protested this appointment to the Atlantic City Firefighters' Local 198 and its president, defendant Joseph Rush. However, he received no support. He also protested to the NJDOP, claiming that he was the next to be promoted under the current policy due to his status as a city resident and alleging that any temporary appointment was improper because there was no provision in the NJDOP regulations providing for temporary appointments. See Pl. Br. at 2; Pl. Compl. at P 34. The NJDOP determined there was no impropriety.

On October 14, 1994, the NJDOP issued new guidelines for the Disposition of a Certification. N.J.A.C. 4A:4-4.8. The new guidelines required officials with appointment authority to give a statement of the reasons why an appointee would be selected over another in the case of a tied score. See id. In response to the new guidelines and at the urging of Chief Brenner, the Mayor enacted Executive Order # 3 of 1994, effective as of December 5, 1994. Exh. I to Pl. Br. [hereinafter Executive Order # 3]. The Executive Order states that:

The appointing **[**8]** authority shall weigh each of the [following] six criteria, without any particular hierarchy of order or priority:

Criteria No. 1: Disciplinary History. The appointing authority shall consider all disciplinary action completed, major and minor, prior to and subsequent to the promulgation of the eligibility list. It is acknowledged that major discipline occurring in the five years prior to the promulgation of the eligibility list is factored into seniority, and the appointing authority will give this aspect due consideration so as to avoid double jeopardy.

Criteria No. 2: Education. The appointing authority will give due consideration to educational background with particular emphasis to be given to management training.

Criteria No. 3: Sick Leave Abuse. The appropriate utilization of sick time shall be considered by the appointing authority. The absence of abuse of sick time shall be an affirmative consideration within the purview of the appointing authority.

Criteria No. 4: Diversity. The appointing authority shall, when available, exercise its discretion to promote diversity in the work place so as to appropriately reflect the makeup of the community.

Criteria **[**9]** No. 5: Residency. The appointing authority shall give due consideration to permanent residents of the City as an affirmative criteria.

Criteria No. 6: Raw Score. The appointing authority reserves the right to consider raw score as determinative in the absence of all other differentiation between or among candidates of equal rank. This criteria applies only to tie breakers, and not to determinations within the Rule of Three.

Plaintiff alleges that on or about December 2, 1994, defendants Whelan, Brenner and Gallagher met to discuss the tie-breaking policy which eventually became Executive Order # 3. Pl. Br. at 2. He claims that these defendants specifically set out to amend the criteria in a manner that would allow them to pass over the plaintiff for promotion. Pl. Br. at 2; Pl. Compl. at P 30. As support for this allegation, plaintiff notes that Chief Brenner's assistant, Chief John Bereheiko, testified in his deposition that he felt that the tie breaking criteria policy was formulated, as were many other such policies, "behind closed doors." See Deposition of Chief John Bereheiko, Exh. E to Pl. Br., at 66 [hereinafter Bereheiko Dep.].

Based on Executive Order **[**10]** # 3 and his own evaluation of the three tied candidates, Brenner recommended to Whelan that first Mooney and later Tamburilla be selected as Battalion Chiefs. Brenner Dep. at 38. In New Jersey, an appointing authority is given broad discretion to choose among the top three individuals on an eligibility list when making a promotion. See N.J.S.A. § 11A:4-8 **[*384]** (authorizing certification of three eligibles);

N.J.A.C. § 4A:4-4.2(c)(2) (same); N.J.A.C. § 4A:4- 4.8(a)(3) (allowing appointment of one of the top three eligibles). Pursuant to this so-called "Rule of Three," Chief Brenner, on December 5, 1994, promoted to Battalion Chief both Mooney, who had been acting as temporary Battalion Chief, and Tamburilla, the two individuals on the promotion list with whom plaintiff was then tied. Brenner Dep. at 38; Pl. Compl. at P 31. As a result, plaintiff was never promoted. Pl. Compl. at P 32.

Plaintiff filed the present complaint in this Court on May 9, 1996. He subsequently amended his complaint on June 12, 1996. In his amended complaint, he alleges that Mayor Whelan, City Solicitor Gallagher, Fire Chief Brenner, Fire Department Supervisors Mooney and Brooks, and Atlantic City Firefighters **[**11]** Local 198 and its president, Joseph Rush, conspired to bypass him for a promotion to Battalion Chief in retaliation for his criticism of Mayor Whelan during his own mayoral campaign. His complaint seeks damages under *42 U.S.C. § 1983* for violations of the First Amendment of the United States Constitution, and under state law for violations of freedom of speech under the New Jersey State Constitution, tortious interference with prospective contractual advantage, and violations of CEPA. In an earlier opinion in this matter, we dismissed plaintiff's claims of defamation and violation of the New Jersey Law Against Discrimination for failure to state claims upon which relief could be granted. See *Fioriglio v. City of Atlantic City, 963 F. Supp. 415 (D.N.J. 1997).* n2 Defendants Terrence Mooney, Dennis Brooks and Atlantic City Firefighters' Local 198 have all been voluntarily dismissed from the case.

II. DISCUSSION

A. Standard of Review

Under Fed. R. Civ. P. 56(c), a court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The non-moving party may not simply rest on its pleadings to oppose a

summary judgment motion but must affirmatively come forward with admissible evidence establishing a genuine issue of fact. See *Celotex Corp. v. Catrett, 477 U.S. 317, 324, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).*

In deciding a motion for summary judgment, the Court must construe the facts and inferences in a light most favorable to the non-moving party. *Pollock v. American Tel. & Tel. Long Lines, 794 F.2d 860, 864 (3d Cir. 1986).* The role of the court is not "to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).*

The substantive law governing the dispute will determine which **[**13]** facts are material, and only disputes over those facts "that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id. at 248.* Where the moving party has carried its initial burden of demonstrating the absence of a genuine issue of material fact, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Idus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).* A genuine issue for trial does not exist "unless the party opposing the motion can adduce evidence which, when considered in light of that party's burden of proof at trial, could be the basis for a jury finding in that party's favor." *J.E. Mamiye & Sons, Inc. v. Fidelity Bank, 813 F.2d 610, 618 (3d Cir. 1987)* (Becker, J., concurring).

B. Consideration of Unsworn, Unsigned Taped Statements

The first task for the court in considering a motion for summary judgment is to determine **[*385]** which evidence it may consider in deciding whether a material factual dispute exists. The court generally must consider evidence set forth in five enumerated categories of **[**14]** materials, namely, "pleadings, depositions, answers to interrogatories, and admissions on file, together with

affidavits, if any." Fed.R.Civ.P. 56(c). Evidence that can be considered by a court under Rule 56 is normally of the same quality of evidence that the fact finder may consider at trial. Thus, for a statement to be admissible, it must be made under oath and on personal knowledge, it must set forth facts which would be admissible in evidence, and it must show that the affiant is competent to testify to the matters stated therein. See Fed. R. Civ. P. 56(e).

Plaintiff asks us to consider transcripts of statements allegedly made by fellow firemen and tape recorded by plaintiff for purposes of this litigation. Plaintiff submits these taped statements as proof of comments allegedly made by Whelan which might show the Mayor's retaliatory motives in not promoting plaintiff. In one comment, allegedly made to another fire captain, the Mayor supposedly said "you firemen always want something and you go and support that asshole Fioriglio for Mayor against me and then you think I am going to give an appointment." The other two declarants supposedly overheard the Mayor say: "F--ck you, **[**15]** F--ck you, you fireman and f--ck that Fioriglio, he will never be Mayor" and "Kim would never be promoted as long as [I am] Mayor." However, none of the statements are sworn to or signed by the alleged speakers. They were not given under oath and neither plaintiff nor his attorney has submitted an affidavit attesting to the transcripts' validity. Thus, these statements fail to meet the requirements of Fed. R. Civ. P. 56(e), and we will not consider them for purposes of summary judgment.

C. Section 1983 Conspiracy Claim

Plaintiff's first claim against the defendants alleges a civil conspiracy to bypass plaintiff for a promotion to Battalion Chief in retaliation for his challenge to the Mayor in the 1994 Atlantic City mayoral campaign. He claims that this conspiracy deprived him of his constitutional rights in violation of *42 U.S.C. § 1983.* n3

"Civil conspiracy is [merely] a vehicle by which § 1983 liability may be imputed to those who have not actually performed the act

denying constitutional rights." *PBA Local No. 38 v. Woodbridge Police Dep't, 832 F. Supp. 808, 832 n. 23 (D.N.J. 1993).* As a result, "a § 1983 conspiracy claim is not actionable without an actual violation of § 1983." id. Section 1983 applies to state actors or private actors acting under color of state law who deprive individuals of federally protected rights. See *Daniels v. Williams, 474 U.S. 327, 330-32, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986); Hudson v. Palmer, 468 U.S. 517, 530, 82 L. Ed. 2d 393, 104 S. Ct. 3194 (1984); Gomez v. Toledo, 446 U.S. 635, 64 L. Ed. 2d 572, 100 S. Ct. 1920 (1980); Estelle v. Gamble, 429 U.S. 97, 106, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976); Sample v. Diecks, 885 F.2d 1099, 1108-10 (3d Cir. 1989).* To make out a § 1983 conspiracy claim, the plaintiff must make specific factual allegations of a combination, agreement, or understanding among all or between any of the defendants to plot, plan, or conspire to carry out the alleged chain of events in order to deprive plaintiff of a federally protected **[**17]** right. See *Darr v. Wolfe, 767 F.2d 79, 80 (3d Cir. 1985); Ammlung v. City of Chester, 494 F.2d 811, 814 (3d Cir. 1974).*

[*386] Although plaintiff's brief completely fails to address this issue, we must first determine whether plaintiff was deprived of a federally protected right. In essence, plaintiff's § 1983 claim is based upon the premise that plaintiff's First Amendment rights were violated when defendants conspired to retaliate against him for his mayoral campaign against Mayor Whelan. n4 It is well-established that political campaigning is protected speech under the First Amendment. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *McIntyre v. Ohio Electoral Comm'n, 514 U.S. 334, 346, 131 L. Ed. 2d 426, 115 S. Ct. 1511 (1995)* (quoting *Roth v. United States, 354 U.S. 476, 484, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957)).* "There is practically **[**18]** universal agreement that a major purpose of [the First]

Amendment was to protect the free discussion of governmental affairs, . . . of course including discussions of candidates. . . ." *Mills v. Alabama, 384 U.S. 214, 218, 16 L. Ed. 2d 484, 86 S. Ct. 1434 (1966)*. As the Supreme Court has repeatedly noted, "'it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *McIntyre, 514 U.S. at 346* (quoting *Buckley v. Valeo, 424 U.S. 1, 14-15, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976)*). Thus, if plaintiff is able to prove that his participation in such protected speech was a substantial motivating factor for the alleged conspirators' actions, he will have demonstrated a violation of § 1983. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977); Green v. Philadelphia Housing Auth., 105 F.3d 882, 885 (3d Cir. 1997); Feldman v. Philadelphia Housing Auth., 43 F.3d 823, 829 (3d Cir. 1994); Holder v. City of Allentown, 987 F.2d 188, 194 (3d Cir. 1993)*.

In order to survive summary judgment, plaintiff must demonstrate that there is a possibility that the jury can "infer from the circumstances (that the alleged conspirators) had a 'meeting of the minds' and thus reached an understanding" to achieve the conspiracy's objective of denying him a promotion in retaliation for his mayoral campaign. *Adickes v. Kress & Co., 398 U.S. 144, 158-59, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970)* (requirements for conspiracy under § 1983 between private actor and public officials). Plaintiff must prove with specificity the circumstances of the alleged conspiracy, such as those addressing the period of conspiracy, object of the conspiracy, and certain actions of the alleged conspirators taken to achieve that purpose. See *Labalokie v. Capitol Area Intermediate Unit, 926 F. Supp. 503, 508 (M.D. Pa. 1996)* (setting forth standard for making out a sufficient § 1983 conspiracy claim); *Loftus v. Southeastern Pennsylvania Transp. Auth., 843 F. Supp. 981, 986 (E.D. Pa. 1994)* (citing *Rose v. Bartle, 871 F.2d 331, 366 (3d Cir. 1989)* (applying this standard in the RICO context). When the sufficiency of civil rights allegations are challenged, the **[**20]** court must look beyond "conclusory allegations . . . to the factual scenario itself to examine

whether the conduct alleged, viewed most favorably to plaintiffs, is reasonably susceptible to falling within the conclusions alleged." *Freedman v. City of Allentown, 853 F.2d 1111, 1115 (3d Cir. 1988).*

The crux of plaintiff's § 1983 conspiracy claim is that Whelan, Brenner and Gallagher conspired to deprive him of a promotion by changing the policy setting forth the factors by which promotional ties are broken. Thus, plaintiff attempts to show that the object of their alleged conspiracy was to deny him a promotion in retaliation for his failed mayoral campaign against Whelan. Plaintiff claims that Whelan, Brenner and Gallagher accomplished this goal, primarily during a **[*387]** "surreptitious meeting," by formulating Executive Order # 3.

Critical to plaintiff's case is his argument that his "vigorous" mayoral campaign so upset the Mayor that he acted in conspiracy with the other defendants to deprive him of his promotion to Battalion Chief. However, plaintiff's supposedly "vigorous" campaign, in reality, was fairly insignificant and was not taken seriously by the Mayor. Plaintiff received **[**21]** under 200 votes in the election. Furthermore, the Mayor has testified that plaintiff's challenge was not an issue for him.

Q: . . . . Generally, you were aware that he accused you of creating jobs for friends and political cronies, correct?

A: No, not -- Fioriglio wasn't on the radar screen, Mr. Perskie. I don't know how else to say that. I don't know all the names of all the candidates. I suspect, if you ask Governor Whitman or Mr. McGreevy or the libertarian candidate what some of the minor party candidates are specifically saying in their platform, I don't think they can answer that, and that was the position I was in, in 1994, with regard to Mr. Fioriglio.

I didn't know what he was giving out, or what he was saying, or what he was campaigning on because the analogy, again, is that he was very much a minor party candidate, if I can continue the analogy; and as such, it's not something the people who were involved in my campaign paid a lot of attention to.

Deposition of Mayor James Whelan, Exh. D to Pl. Br., at 15 [hereinafter Whelan Dep.].

Plaintiff speculates that defendants changed the policy used to break ties specifically so that he would be adversely **[**22]** affected under a consideration utilizing the new criteria. He claims that the purpose of the delineation of the six new criteria was not, as stated in Executive Order # 3, in response to the newly enacted N.J.A.C. 4A:4-4.85, which requires officials with appointment authority to give a statement of the reasons for their appointment choices in the case of a tied score, but rather to deny him a promotion. He refers to a December 2, 1994 meeting at which defendants Whelan, Brenner and Gallagher "met to discuss the amending of the tie breaking criteria in a way that would allow the defendants to pass over the plaintiff for a promotion" and then alleges that "in accordance with their surreptitious meeting, the Mayor enacted Executive Order Number 3 of 1994." Pl. Br. at 4. However, plaintiff can offer no concrete proof that the December 2, 1994 meeting occurred. Neither Brenner nor Gallagher testified that a December 2, 1994 meeting took place and Whelan cannot recall any specific meeting held to deal with the tie-breaking promotional policy. Whelan Dep. at 69. Plaintiff's only evidence is the testimony of Deputy Chief Bereheiko who said that he suspected that Whelan, Brenner and Gallagher **[**23]** would have met in closed door sessions because few policy decisions are made "open forum." Bereheiko Dep. at 66.

Furthermore, when questioned about his conclusion regarding the alleged motives behind Executive Order # 3, plaintiff admits reliance upon unsubstantiated assumptions and speculation.

Q: So, there's also a part here that says that the meeting between defendants Whelan, Brenner, Mooney, Brooks and Gallagher and I'm going to quote: "Conspired to deceive the Plaintiff Fioriglio, of his rightful promotion by changing the regulations governing promotions and breaking the tie, to taking into account different

factors under which the plaintiff would not emerge as the victor in this three-way tie situation." So, you don't know if that's what they talked about?

A: I -- it's my belief that that's what they talked about. I have no personal knowledge as to what they said.
Q: You have no personal knowledge and the hearsay that you have heard, doesn't, no one says that they heard them talk about that, correct?
A: That's correct.

Sept. 26, 1997 Deposition of Kim Fioriglio, Exh. D to Certification of Brian J. Culler, at 29-30 [hereinafter Fioriglio Sept. 26 Dep.]. Thus, **[**24]** plaintiff admits he has no personal knowledge about what the defendants talked about during the alleged meeting at which Executive Order # 3 was formulated. He **[*388]** has absolutely no evidence suggesting that defendants set out to retaliate against him for exercising his First Amendment rights. Nor can he point to any other evidence which demonstrates that defendants intentionally created new criteria that would adversely affect his chances of being promoted. Whelan and Gallagher both testified that they had discussions concerning promotional policy but that they did not have any particular discussion or discussions about plaintiff specifically.

From Whelan's deposition:

Q: Was there more than one meeting where you discussed the promotion list involving Fioriglio and the criteria to be utilized in those promotions?

A: Yes. I would say some of these meetings may have been on the fly. May have been other business, and this came up. I don't know that there's anything in my calendar that would say, you know, meeting with Brenner to discuss Fioriglio. I may have met with the chief on something else. May have been before or after a director's meeting with Paul Gallagher.

Clearly, **[**25]** this issue, in view of the fact that there were upcoming vacancies, battalion chief was an issue that needed to be resolved. If we were going to change the prior policy and institute a new policy, what was that new policy going to be. So I don't want to say there was a sense of urgency, but there was some focus on this to get this done so that we could go ahead. And if, in fact promotions were to be made, make whatever motion is going to be made.

Q: How many meetings of this nature took place with -- again, I realize I can't pinpoint you specifically. It's not fair. Can you estimate how much such meetings took place with -- starting with Paul Gallagher?

A: Again, the nature of the relationship that I have with the city solicitor was, Paul Gallagher or Mr. Cory, we meet on a regular basis to go over the topics of the day. There were not meetings -- I don't recall. Maybe there was. I don't recall a meeting or a specific meeting to deal with tie-breaking promotional policy.

I do recall discussions taking place, probably, you know, three or four times with Mr. Gallagher, and three or four times with Chief Brenner and Chief Rifice and Andy Amir, our business administrator. **[**26]**

I think at one point we were of a consensus that the old policy didn't give us the flexibility that we wanted, and that a new policy needed to be derived. And, again, probably directed to Paul: Put something out, circulate it to the business administrator, chief of police, chief of fire, get their input, input from me, and put together a final document.

Q: These three to four meetings, you understood, went to discussing the tie-breaking criterion as involved Kim Fioriglio's promotional list?

A: No. It discussed a broad policy of tie-breaking. Some of the problems of the other policy were highlighted by the fact that we

had a situation where Chief Brenner, in particular, he was in the fire department, was not happy with how that would play out.

Q: Let me ask it this way. How many meetings did you have -- firstly, let's start with Paul Gallagher, and I want specific meetings that dealt with the issue of the promotional exam as it affected Tamburilla, Fioriglio, and Mooney.

A: I don't recall how many, if any, I had that were specifically dealing just with that promotion.

Q: How many meetings did you have non-specific where that issue came up with Gallagher?

A: **[**27]** Again, I don't recall. The best I can tell you, Mr. Perskie, is what I think I already told you. I probably discussed it on three or four occasions with Mr. Gallagher. I don't recall that it was discussed in the context specifically of Fioriglio, Tamburilla, Mooney, but, rather, in the context of --

Q: I see what you're saying.

A: -- how do we break the ties; yet Chief Brenner is saying the policy in place right now is going to deny me the ability to promote Terry Mooney. I need Terry **[*389]** Mooney on staff to do the budget, and so forth.

Whelan Dep. at 67-71.

From Gallagher's Deposition:

Q: Did you ever have discussions, prior to the institution of Executive Order Number 3, 1994, that you drafted with the Mayor, regarding Kim Fioriglio?

A: No.

Q: The Mayor never brought Kim Fioriglio up to you, in any way, for any reason at all; correct?

A: No.

Deposition of Paul Gallagher, Exh. V to Pl. Br., at 54 [hereinafter Gallagher Dep.]. Based on this lack of hard evidence, plaintiff has failed to show that Whelan conspired with either Brenner or Gallagher to retaliate against him for his failed mayoral campaign.

Unable to establish proof of any improper **[**28]** conduct during the formulation of Executive Order # 3, plaintiff next attempts to prove his conspiracy theory by alleging that defendant Brenner searched through his personnel files to discover which criteria would reflect badly upon him. He claims Brenner then brought the results of this alleged search to the attention of Whelan and Gallagher so that they would be able to draft a promotion policy which disadvantaged him. However, plaintiff has failed to offer any evidence in support of this allegation. Again, he relies purely on speculation and conjecture.

Q: What role did Ben Brenner have in your appointment; if you know?

A: In my appointment?

Q: Or your non-appointment, I'm sorry?

A: The exact role that he played, I couldn't say, because I wasn't at the meetings. But, I can say that he was a confidante of the Mayor. He provided the Mayor with information necessary to concoct the Executive Order that changed the way ties would be broken in the City of Atlantic City. . . .

Q: Now, you said you think Ben Brenner gave him, the Mayor, information necessary to concoct this new Executive Order. Why do you think that? Do you have any evidence to support that?

A: **[**29]** The make up of the Executive Order, was produced to exclude me from the possibility of promotion.

Q: Do you have any knowledge of anything that Ben Brenner did, or any information he gave to the Mayor, necessary to create this Executive Order?

A: Well, if you look at the six criteria for promotions, these are all Atlantic City Fire Department specific, as well as, in some cases, general to other Fire Departments. But, disciplinary history, education, sick leave, and raw score are all specific to the Fire Department.

Q: What do you mean "specific to the Fire Department?"

A: Well, the Mayor wouldn't have any knowledge of raw score, without asking for it, without having it compiled by someone under him. Sick leave, education and disciplinary history.

Q: Well, I'm confused. I still don't understand what you mean by that. Are you saying -- I'm trying to find out what you think Ben Brenner did in your own words. What do you think he did with or without the Mayor, to create or help create Executive Order Number 3?

A: Well, I don't think Ben Brenner is capable of doing anything without the Mayor's approval. So, with his approval, I believe he went into my personnel **[**30]** file and obtained data and compared that data to the personnel files of the other eligibles and came up with what they think is a way to exclude me from getting promoted.

Q: Why do you think he did that? Why do you think that those events occurred?

A: Because the Mayor asked Chief Brenner to do it.

Q: How do you know that? What do you base that on?

A: The fact that they're here.

Q: Anything else?

A: The fact that they're here.

Q: Anything else?

A: No. I can't think of any other reason that he would do it except he was told to do it by the Mayor.

[*390] Q: Did anyone tell you or do you have, has anyone told you that the Mayor told Ben Brenner to do this?

A: No.

Fioriglio Sept. 19 Dep. at 110-113. Thus, plaintiff's theory about Brenner searching through his personnel files is completely unsubstantiated.

Plaintiff's case against Gallagher is based on the allegation that Gallagher participated in the alleged meeting where the promotional policy was discussed and then drafted Executive Order # 3 in order to deprive plaintiff of a promotion. See Fioriglio Sept. 26 Dep. at 97. However, plaintiff admits that he has no information that **[**31]** would lead him to believe that Gallagher participated in any role except that of an attorney whose job required him to prepare documents at the direction of the Mayor.

Q: Do I understand correctly, from your testimony, earlier today, that, the reason Mr. Gallagher is a defendant, is because you believe he was a part of a meeting at which time the Executive Order, DM-2, was devised?

A: That's correct.

Q: And, other than your belief that he participated in that meeting, is there any other fact out there, that you believe, plays a role in his being a defendant today?

A: When you mention "fact," there, I have no additional facts. However, I have suspicions that there were other meetings, other than just this meeting, based on the size and complexity of the document.

Q: In other words, you think the process of drafting the document itself, may have taken several meetings?

A: I do.

Q: But other than whatever facts support the preparation of that document, there is nothing else beyond that, that brings Mr. Gallagher into the case?

A: No.

Q: Do you have any, aside from what you believe that Mr. Gallagher participated in any other role, other **[**32]** than the drafting of Executive Order, DM-2?

A: With regard to this case, no.

Fioriglio Sept. 26 Dep. at 96-97. Gallagher's actions in carrying out his duties as city solicitor by drafting a policy at the direction of the Mayor, in compliance with N.J.A.C. 4A:4-4.8, cannot constitute a violation of § 1983 without any evidence that the drafting was done with the purpose of retaliating against plaintiff.

Plaintiff also is unable to point to any evidence suggesting that he was treated in a negative manner by any of the defendants either during or after his campaign. In fact, as to defendant Gallagher, he admits that he does not know him personally and would not now know him if plaintiff were to see him. See Fioriglio Sept. 26 Dep. at 98. Furthermore, he offers nothing but

unsubstantiated opinions that he has been threatened by either Whelan or Brenner.

Q: Personally, about you, has the Mayor, post May 14th, 1994 had any conversation with you at all?

A: Oh yeah. We've had conversations, not political. Not really political.

Q: Have those conversations been cordial or not cordial?

A: Yes, they were, they were politically correct. Cordial. They were **[**33]** okay.

Q: Has the Mayor threatened you or made threatening gestures or looks at you, since he ran for Mayor against you?

A: Yeah.

Q: Tell me about those. . . .

A: After the campaign? I believe things have been done to me after the campaign, that, were motivated by the Mayor's agenda.

Q: I'm just talking about whether he has said anything, that you saw, heard him say, you personally, or saw him do, directed to you, glared at you or said an unfriendly word to you? Is there anything of that, that you can tell us about?

A: The only dealings I've had with Mayor Whelan were in public and that was usually during an incident on the Fire Department and there was never any glare or unfriendly note in public.

Q: Now, how about, have you heard of any words that he has said, to any other party, relative to you, after the campaign, **[*391]** other than the May 14th statement you've told us about?

A: Nothing I can substantiate because people say things that I don't really put much value in. And what those things are, at this time, I don't even remember. But, if I didn't write them down, if I didn't include them in my appeal, if I didn't give them to my lawyer, they were **[**34]** meaningless or impossible to prove.

Q: Now, what about Chief Brenner, did he, during the campaign, did he make any comments to you or give you any hostile looks or anything that you can remember?

A: No, I can't say that he did.

Q: Post campaign, has he said anything to you, any words to you or made any gestures or looks to you that you found offensive or relevant to this proceeding?

A: Not particularly.

Fioriglio Sept. 19 Dep. at 89-91.

Furthermore, plaintiff admits that the newly adopted promotion criteria, disciplinary history, education, sick leave, residency and raw score, are appropriate considerations in deciding whom to promote. Fioriglio Sept. 26 Dep. at 121-39. He then acknowledges that he would not rank highly on some of these admittedly appropriate criteria. He admits that he has had disciplinary problems in his past. Oct. 9, 1997 Deposition of Kim Fioriglio, Exh. B to Certification of Brian J. Cullen, at 22-39 [hereinafter Fioriglio Oct. 9 Dep.]. He also does not dispute that the other two candidates who were being considered for a promotion have better educational backgrounds than he does.

Q: All right. I want to know if it is your **[**35]** position, in this litigation, that your educational background is equal to or superior to Mr. Mooney or Mr. Tamburilla?

A: Without defining -- between the two, the fire-related education or the academic education, or the academic education. . . . I will

say, for the record, that after hearing testimony, with regard to this litigation, that, I believe both Mooney and Tamburilla have higher academic degrees than I do.

Fioriglio Oct. 9 Dep. at 41-42.

Plaintiff simply cannot maintain a claim of civil conspiracy in violation of § 1983 on the unsubstantiated theory that defendants conspired against him in the process of formulating the new promotional criteria. He has presented this Court with no proof of improper conduct by the defendants upon which a jury could base a finding in his favor. The Mayor adopted rational promotion criteria, pursuant to N.J.A.C. 4A: 4-4-8.5, which in no manner discriminated against plaintiff or biased him in the promotional decision-making process. He has absolutely no proof that Brenner's decision not to promote him, as was Brenner's prerogative under New Jersey's Rule of Three, see N.J.S.A. § 11A:4-8 (authorizing certification of three **[**36]** eligibles); N.J.A.C. § 4A:4-4.2(c)(2) (same); N.J.A.C. § 4A:4- 4.8(a)(3) (allowing appointment of one of the top three eligibles), was made to carry out a conspiratorial purpose of retaliation against him for his challenge to the Mayor during the 1994 mayoral race. Plaintiff also has not shown how Gallagher's role in bringing the City into compliance with N.J.A.C. 4A:4-4.8 violates his First Amendment rights. Because he has completely failed to show that any of the individual defendants conspired against him, he likewise has not demonstrated any theory upon which the City of Atlantic City can be held liable. Therefore, we will grant summary judgment on plaintiff's § 1983 conspiracy claim in favor of all of the defendants.

D. State Constitutional Claim

Plaintiff alleges that defendants violated his free speech rights protected by *Article 1 P 6* of the New Jersey Constitution by failing to promote him in retaliation for his mayoral campaign. n5 In order to succeed on this claim, plaintiff must show that he engaged in protected speech and that the speech was a substantial motivating factor in the adverse employment decision. See, e.g.,

Connick v. Myers, 461 U.S. 138, 142, **[**37]** *75 L. Ed. 2d 708, 103* **[*392]** *S. Ct. 1684 (1983); Pickering v. Board of Educ., 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968); Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977).* As discussed at length in Part II.C., plaintiff has no evidence that any action was taken against him as a result of his protected speech. Plaintiff has nothing but speculation and conjecture linking his speech during the campaign to his failure to be promoted and therefore his state constitutional claim, like his § 1983 claim, must fail. We will therefore grant summary judgment on defendants' motions for summary judgment on plaintiff's state constitutional claim.

E. Tortious Interference **[**38]** With Contractual Advantage

Plaintiff alleges that the defendants' failure to promote him constitutes an actionable claim under state law for tortious interference with economic or contractual advantage. Fundamental to a cause of action for tortious interference with economic or contractual advantage is the requirement that the claim be directed against defendants who are not parties to the relationship; one cannot interfere with one's own contractual or economic relationship. The New Jersey Supreme Court has clearly stated that a tortious interference claim must "be directed against defendants who are not parties to the relationship." *Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 752, 563 A.2d 31 (1989).* A situation among two parties to a contract would be governed by contract law. *Van Natta Mechanical Corp. v. Di Staulo, 277 N.J. Super. 175, 182, 649 A.2d 399 (App. Div. 1994).* Because the City of Atlantic City is a party to the employment contract between itself and plaintiff, the claim against it must fail.

Furthermore, the Court holds that the individual defendants, as employees of Atlantic City, cannot be liable for tortious interference. We dealt **[**39]** with this precise issue in *Hurley v. Atlantic City Police Dept., 1995 U.S. Dist. LEXIS 20608,* Civ. A.

Nos. 93-260(JEI), 94-1124(JEI), *1995 WL 854478* (D.N.J. Aug. 4, 1995), and found that New Jersey law supported the proposition that city employees cannot be liable for interfering with another's contract with their common employer. We now repeat our Hurley analysis and renew our conviction that city employees cannot be found liable for tortious interference with a co-employee's contractual advantage:

The Printing Mart court touched on, but did not resolve, this issue. In discussing the issue, the court first noted that employees could "theoretically" be held liable for interfering with another's contract with the employer because the employee is not a party to the contract. *116 N.J. at 761.* Furthermore, employees generally are not relieved from individual tort liability simply because they act on behalf of the employer. *Id. at 762.* On the other hand, the court noted that while the corporate entity may be the technical party to the employment contact, the corporation can act only through its agents and employees. *Id. at 761.* Employees are also generally immune from tort liability where **[**40]** they exercise a privilege held by the employer. *Id. at 762.* These principles would indicate that the action would not lie against employees.

The Printing Mart court, finding both that the record and arguments before it did not address the issue and that holding employees liable "may require the Court to create a special cause of action," declined to resolve this conflict. *Id. at 763.* However, post-Printing Mart courts have generally found that agents of a corporation cannot be liable for malicious interference with another's contractual relations with the corporation. See *F.D.I.C. v. Bathgate, 27 F.3d 850, 875-76 (3d Cir. 1994)* (bank directors not liable for malicious interference with plaintiffs relations with bank); *Sammon v. Watchung Hills Bank, 259 N.J. Super. 124, 127, 611 A.2d 674 (Law Div. 1992)* (officer and sole shareholder of corporation not liable for malicious interference). One court in this district has also found that where co- employees act within the scope of their employment in harassing a plaintiff, they cannot be held liable for tortious interference with the plaintiff's employment contract. **[*393]** *Obendorfer v. Gitano Group, Inc., 838 F. Supp.* **[**41]** *950, 956 (D.N.J. 1993).*

Hurley, 1995 U.S. Dist. LEXIS 20608, 1995 WL 854478 at *13-14.

As in Hurley, it appears here that all actions allegedly taken by the individual defendants against plaintiff were in the course of their employment. See *Obendorfer, 838 F. Supp. at 956* (dismissing claim where plaintiff alleged that all harassing acts by supervisory employee were within scope of employment). Furthermore, the Printing Mart court indicated that a tortious interference claim against an employee of a party to the contract might require the creation of a new cause of action, and, as we noted in Hurley, it is not the role of this court to create new actions under New Jersey law. See *Bathgate, 27 F.3d at 876.* Thus, we will grant both the City's and the individual defendants' motions for summary judgment on plaintiff's tortious interference with contractual advantage claim.

F. CEPA Claim

CEPA, the New Jersey equivalent of a whistleblower statute, protects from retaliation employees who disclose or threaten to disclose an employer's wrongful or illegal activities, or who testify before a public body regarding an employer's violation of a law. N.J.S.A. § 34:19-3. To succeed on a **[**42]** CEPA claim, a plaintiff must show (1) that he disclosed or threatened to disclose the activity to a supervisory or public body, (2) that he suffered an adverse employment decision, and (3) a causal connection between the two. *Keelan v. Bell Communications Research, 289 N.J. Super. 531, 538, 674 A.2d 603 (App. Div. 1996); Young v. Schering Corp., 275 N.J. Super. 221, 233, 645 A.2d 1238 (App. Div. 1994),* aff'd, *141 N.J. 16, 1995 WL 413266, 660 A.2d 1153 (N.J. 1995).*

Because of the lack of evidence presented by plaintiff in support of his theory that he was not promoted in retaliation for his failed mayoral campaign, see supra Part II.C., we find that plaintiff has similarly failed to demonstrate sufficient evidence in support of his CEPA claim. Although we disagree with defendant Brenner's

arguments that plaintiff's campaign comments against the Mayor were not made to a public body and therefore do not come within the protection of CEPA, we agree with the defendants that plaintiff has failed to show that the adverse employment action he suffered was causally connected to his campaign comments. Plaintiff has produced no evidence to support his theory that his failure to be promoted was **[**43]** causally connected to his failed mayoral campaign. Without any evidence from which a jury could infer that he was not promoted because of his mayoral campaign rather than because of a Rule of Three determination by Brenner in accordance with Executive Order # 3, plaintiff simply cannot survive summary judgment. n6 Therefore, we will grant summary judgment in favor of the defendants on plaintiff's CEPA claim.

G. Absolute or Qualified Immunity

Defendants Whelan and Gallagher have both put forth the defense of absolute and/or qualified immunity. Because we are granting summary judgment on the merits in favor of all of the defendants, including Whelan and Gallagher, we need not address the issue of immunity.

[*394] H. Defendant Joseph Rush

Defendant Joseph Rush, the president of the voluntarily dismissed defendant Atlantic City Firefighters' Local 198 during the relevant period of events, has not submitted his own motion for summary judgment. Plaintiff has not mentioned defendant Rush in any of his present submissions and we do not see any manner in which he could be found liable. Thus, as we are granting the other defendants' motions for summary judgment on each of plaintiff's claims because plaintiff has failed to set forth any genuine issues of fact upon which a jury could base a finding his favor, we will also dismiss all claims against defendant Rush.

III. CONCLUSION

For the foregoing reasons, the Court will grant summary judgment in favor of the defendants on plaintiff's § 1983 conspiracy claim, state constitutional claim, tortious interference claim, and CEPA claim. **[**45]** As plaintiff no longer has any claims remaining against any defendants, we will dismiss plaintiff's complaint in its entirety. An appropriate order will follow.

Date: March 5, 1998.

JOSEPH E. IRENAS, U.S.D.J.

----------Footnotes----------

n1 All references to the plaintiff's complaint are references to his amended complaint, filed June 12, 1996.

n2 Plaintiff had also filed a federal suit against the NJDOP and several state officials in which he alleged civil rights violations and reverse discrimination arising from the state's promotion testing procedures and the City's failure to promote him. We dismissed this suit on October 15, 1996. *Fioriglio v. New Jersey Dep't of Personnel, 1996 U.S. Dist. LEXIS 15399, Civ. A. No. 95-3422, 1996 WL 599400* (D.N.J. Oct. 15, 1996).

n3 *42 U.S.C. § 1985*(3) sets forth a private right of action that specifically addresses conspiracies to deprive one of one's civil rights. Section 1985(3) generally describes a conspiracy of two or more persons for the purpose of depriving another of equal protection of the laws or equal privileges and immunities under the laws. A claim under § 1985(3) does not require state action, but it does require proof that a conspirator's action was motivated by a race-based or class-based, invidious discriminatory animus. See *Griffin v. Breckenridge, 403 U.S. 88, 102-03, 29 L. Ed. 2d 338, 91 S. Ct. 1790 (1971); Lake v. Arnold, 112 F.3d 682, 688 (3d Cir. 1997).* Thus, § 1985(3) would not be applicable here because

plaintiff has not shown a race-based or class-based deprivation of his rights to equal protection. Furthermore, because he asserts his conspiracy claim against public actors rather than private actors, § 1983 is the more appropriate vehicle.

n4 In his complaint, plaintiff makes a broader assertion of constitutional deprivations, but in his submissions to the Court he has pursued only his theory based upon retaliation for his First Amendment activities in running against the Mayor. Thus, we consider only his allegation of a § 1983 conspiracy to deprive him of his federally protected First Amendment rights.

n5 Plaintiff's complaint incorrectly cites Article 1, P 5. Article 1, P 6 provides for freedom of expression and is interpreted in the same way as the First Amendment to the United States Constitution. See *Anderson v. Sills, 143 N.J. Super. 432, 363 A.2d 381 (Ch. Div. 1976).*

n6 We note that the elements which a plaintiff must prove in order to succeed on a CEPA claim are very similar to those necessary to prove a violation of Title VII and that courts commonly utilize principles from the Title VII landscape in analyzing CEPA claims. See *Bowles v. City of Camden, 993 F. Supp. 255, 1998 U.S. Dist. LEXIS 1408, 1998 WL 47584 (D.N.J. 1998)* (Irenas, J.). Under such an analysis, litigants and courts often proceed on a "pretext" theory whereby plaintiffs are required to make out a prima facie case of retaliation by showing the three CEPA elements. See id. at *6. If the plaintiff succeeds in making out a prima facie case, the burden then shifts to the defendant to advance a legitimate, nondiscriminatory reason for making the adverse employment decision. See id. Once the defendant has proffered such a reason, the plaintiff must raise an issue of fact regarding whether the defendant's proffered explanation is pretextual or whether retaliatory discrimination was more likely than not a determinative factor in the decision. See id. Because none of the litigants here have proceeded on this pretext theory analysis and because we find that plaintiff's failure to present sufficient evidence of a causal

connection has precluded him from making out even a prima facie case of retaliation, we need not further address the burden-shifting mode of analysis in order to dispose of plaintiff's CEPA claim.

KIM D. FIORIGLIO, Plaintiff, v. CITY OF ATLANTIC CITY, JAMES WHELAN, PAUL GALLAGHER, BENJAMIN BRENNER, TERRENCE MOONEY, DENNIS BROOKS, ATLANTIC CITY FIREFIGHTERS' LOCAL 198, AND JOSEPH RUSH, Defendants.

CIVIL ACTION NO. 96-2295 (JEI)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

May 6, 1997, Decided

May 6, 1997, ORIGINAL FILED

COUNSEL:
APPEARANCES:

For Plaintiff: Perskie & Wallach, By: M. Daniel Perskie, Esq., Kevin R. Moses, Esq., Northfield, N.J.

For City of Atlantic City, Defendant: Freeman, Zeller & Bryant, By: Ronald Freeman, Esq., Cherry Hill, N.J. For James Whelan, Defendant: Murray, Murray & Corrigan, By: David F. Corrigan, Esq., Tamara M. Burke, Esq., Little Silver, N.J. For Dennis Brooks, Defendant: Goldenberg, Mackler & Sayegh, By: Harry Goldenberg, Esq., Atlantic City, N.J. For Benjamin Brenner, Defendant: Levine, Staller, Sklar, Chan, Brodsky & Donnelly, By: John M. Donnelly, Esq., Atlantic City, New Jersey. For Terrence Mooney, Defendant: Tuohy & Tuohy, By: Dennis Tuohy, Esq., Atlantic City, N.J.

JUDGES:
JOSEPH E. IRENAS, U.S.D.J.

OPINIONBY:
JOSEPH E. IRENAS

OPINION:

[*418] OPINION

IRENAS, District Judge:

This matter involves claims brought by firefighter Kim Fioriglio ("Fioriglio") against the City of Atlantic City ("City"), the City's Mayor, James Whelan, and several City officials following the City's decision not to promote Fioriglio to the position of battalion chief. Fioriglio maintains that the decision to not promote **[**2]** him was the result of a conspiracy among the defendants to punish him for running against James Whelan in the 1994 mayoral election. Fioriglio previously filed a federal suit against the New Jersey Department of Personnel ("NJDOP") and several state officials in which he alleged civil rights violations arising from the state's promotion testing procedures and the City's failure to promote him (the "racial discrimination suit"). This Court dismissed the racial discrimination suit on October 15, 1996. Fioriglio never attempted to join the current claims and defendants in the racial discrimination suit.

Defendants now move to dismiss plaintiff's complaint as barred by New Jersey's entire controversy doctrine. Defendants also move to dismiss portions of plaintiff's complaint for failure to state claims upon which relief can be granted. Because New Jersey's entire controversy doctrine does not attach to this Court's prior federal judgment or Fioriglio's state administrative proceedings, the Court will deny defendants' motions to dismiss under the entire controversy doctrine. Because Fioriglio's defamation count was brought outside the statute of limitations and because his N.J.L.A.D. count **[**3]** fails to state a claim upon which relief can be granted, the Court will grant defendants' motions in part.

I. BACKGROUND

Kim Fioriglio's claims in the present action, as well as his claims in the racial discrimination suit, arise from his inability to achieve a promotion to the rank of battalion chief in the Atlantic City Fire Department. In order to be eligible for that promotion, Fioriglio took the battalion fire chief examination administered by the

NJDOP. The examination consisted of a written section and an oral section. Fioriglio completed the written portion of the examination on September 22, 1990 and completed the oral portion on November 21, 1991. On February 6, 1992, the exam results were posted and Fioriglio was ranked number one on the eligibility list from which promotions to battalion chief are made. On February 18, 1992, Fioriglio received notice that the NJDOP and U.S. Department of Justice had decided to re-score the examination pursuant to a 1977 consent decree which was issued in response to allegations of racial discrimination in the hiring and promotion of minority firefighters. The consent decree required the NJDOP to conduct job analysis of the firefighter **[**4]** promotional titles and to establish examination and promotion procedures in a manner consistent with the consent decree. Prior to the re-scoring, the written component of the examination had been worth 40% of the total evaluation. After the re-scoring, the written component was scored on a pass-fail basis. As a result, Fioriglio dropped from number one on the eligibility list to number twelve. Fioriglio subsequently filed administrative appeals to increase his score. After these appeals, Fioriglio moved from number twelve on the eligibility list up to a four-way tie for sixth.

[*419] In the time period following Fioriglio's placement on the promotion list, those individuals ranked higher than Fioriglio and one of the individuals tied with him were promoted to battalion chief. By April 26, 1993, Fioriglio was in a three-way tie at the top of the promotion list. In February 1994, Fioriglio announced that he was running for Mayor of Atlantic City, a position held by James Whelan. In an election held on May 12, 1994, Whelan defeated Fioriglio and other opponents by a significant margin.

In New Jersey, an appointing authority is given broad discretion to choose among the top three individuals **[**5]** on an eligibility list when making a promotion. See N.J.S.A. § 11A:4-8 (authorizing certification of three eligibles); N.J.A.C. § 4A:4-4.2(c)(2) (same); N.J.A.C. § 4A:4-4.8(a)(3) (allowing appointment of one of the top three eligibles). Pursuant to this so-called "Rule of Three," Mayor James Whelan, on December 1, 1994, promoted to battalion chief

the two individuals on the promotion list with whom Fioriglio was then tied. As a result, Fioriglio was never promoted.

On January 17, 1995, Fioriglio filed a complaint with the NJDOP and the Public Employment Relations Commission ("PERC") alleging that the City's refusal to promote him was the result of "discriminatory and retaliatory motives." By decision dated June 26, 1995, the PERC refused to issue a complaint because they did not have the statutory authority to address Fioriglio's grievances. On February 13, 1996, the NJDOP found that the initial determination of the appointing authority was correct and decided not to take action on Fioriglio's administrative complaint. On April 14, 1996, Fioriglio filed an appeal of the NJDOP's decision with the Division of Merit System Practices and Labor Relations. That appeal is still pending. **[**6]**

On July 19, 1995, Fioriglio instituted his racial discrimination suit in the U.S. District Court against the NJDOP and several individual state government officials. In his complaint, Fioriglio alleged various civil rights violations arising from the state's adjustment of the examination scores in conjunction with the consent order and his subsequent inability to earn the promotion to battalion chief. Fioriglio alleged that the state's actions to comply with the consent decree had discriminated against him based on his race. He filed an amended complaint in that matter on September 15, 1995. As amended, Fioriglio's racial discrimination complaint alleged violations of the Civil Rights Act of 1871, *42 U.S.C. § § 1983*, 1985, Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e-2*, the New Jersey Constitution, the New Jersey Law Against Discrimination ("N.J.L.A.D."), N.J.S.A. § § 10:5-1 to 5-42, and common law tort principles.

Fioriglio initiated the present action on May 9, 1996 (the "retaliation suit"). In this complaint, Fioriglio alleged that several City officials including Mayor James Whelan, City Solicitor Paul Gallagher, Fire Chief Benjamin Brenner, and Fire Department **[**7]** supervisors Terrence Mooney and Dennis Brooks conspired against him in violation of his free speech rights under the federal

and state constitutions. In particular, Fioriglio alleged that the defendants denied him a promotion to battalion chief in retaliation for his mayoral campaign against James Whelan. Fioriglio also asserted claims for defamation and tortious interference with business activities as well as claims pursuant to the N.J.L.A.D. and the New Jersey Conscientious Employee Protection Act ("C.E.P.A."), N.J.S.A. § § 34:19-1 to 19-8.

In connection with discovery in the racial discrimination suit, the defendants in that suit deposed Fioriglio on July 16, 1996. Fioriglio indicated at his deposition that the reason he was not promoted was because he ran for mayor against James Whelan. Furthermore, at oral argument during the racial discrimination suit, Fioriglio stated in open court, "I ran for mayor against the Mayor and they didn't promote me because I ran for mayor." *Fioriglio v. New Jersey Dep't of Personnel, 1996 U.S. Dist. LEXIS 15399, No. 95-3422, 1996 WL 599400 n.6* (D.N.J. Oct. 15, 1996) (Irenas, J.). Fioriglio also stated that so long as James Whelan is Atlantic City's mayor, "there won't be **[**8]** no promotion." Id. On October 15, 1996, the District Court dismissed Fioriglio's complaint in the racial discrimination suit on the merits. The defendants in the present action have **[*420]** now moved to dismiss Fioriglio's complaint. Although Fioriglio failed to join the present claims and defendants in his racial discrimination suit, the Court finds his present action not barred by New Jersey's entire controversy doctrine.

II. DISCUSSION

A. Entire Controversy Doctrine--Racial Discrimination Suit

New Jersey's entire controversy doctrine "encompasses a mandatory rule for the joinder of virtually all causes, claims, and defenses relating to a controversy between the parties engaged in litigation." *Cogdell v. Hospital Ctr. at Orange, 116 N.J. 7, 16, 560 A.2d 1169 (1989).* The entire controversy doctrine requires that whenever possible, "the adjudication of a legal controversy should occur in one litigation in only one court." *Id. at 15.* The doctrine

dictates that a party must assert all affirmative claims he or she has against another party including counterclaims and cross-claims. See *Circle Chevrolet v. Giordano, Halleran & Ciesla, 142 N.J. 280, 289, 662 A.2d 509 (1995);* **[**9]** *Ajamian v. Schlanger, 14 N.J. 483, 487-89, 103 A.2d 9,* cert. denied, *348 U.S. 835, 99 L. Ed. 659, 75 S. Ct. 58 (1954).* In addition, a party must join "all parties with a material interest in the controversy, i.e., those who can affect or be affected by the judicial outcome of the controversy." *Circle Chevrolet, 142 N.J. at 289; Cogdell, 116 N.J. 7 at 23, 26, 560 A.2d 1169.* However,

the entire controversy doctrine does not require that all claims and parties proceed to culmination in one litigation. Rather, all claims and parties must initially be joined together before one court. The Court can determine for itself how best to proceed with the various claims and parties. In order to exercise this discretion, however, the court must be fully informed of the extent of the controversy before it.

Petrocelli v. Daniel Woodhead Co., 993 F.2d 27, 31 (3d Cir. 1993). New Jersey Court Rule 4:30A sets forth the penalty for failing to comply with the requirements of the entire controversy doctrine. The Rule states: "Non-joinder of claims or parties required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required **[**10]** by the entire controversy doctrine." R. 4:30A. n1

[11]**
The goals of the entire controversy doctrine are threefold: "(1) to encourage the comprehensive and conclusive determination of a legal controversy; (2) to achieve party fairness, including both parties before the court as well as prospective parties; and (3) to promote judicial economy and fairness by avoiding fragmented multiple and duplicative litigation." *Mystic Isle Dev. Corp. v. Perskie & Nehmad, 142 N.J. 310, 322, 662 A.2d 523, 529 (1995)* (citations omitted). However, it should be noted that the entire controversy doctrine is limited in certain respects. The doctrine only bars claims of which the plaintiff was or should have been

aware at the time of the prior litigation, see *Circle Chevrolet, 142 N.J. at 294*, and which arise from "related facts or the same transaction or series of transactions." *DiTrolio v. Antiles, 142 N.J. 253, 267, 662 A.2d 494 (1995)*. Moreover, because the entire controversy **[*421]** doctrine is equitable in nature, it is not applied where "joinder would result in significant unfairness to the litigants or jeopardy to a clear presentation of the issues and a just result," *Mystic Isle, 142 N.J. at 323, 662 A.2d at 529*, or where "the first proceeding **[**12]** occurred before a lesser tribunal." *Petrocelli, 993 F.2d at 29*. n2

Defendants assert that Fioriglio's current action is barred by New Jersey's entire controversy doctrine. They allege that Fioriglio was aware of the present cause of action prior to his institution of the racial discrimination suit. Therefore, defendants assert, Fioriglio was required to join the present claims and defendants to that previous action because both actions arose from Fioriglio's attempt to be promoted to battalion chief. **[**13]** Fioriglio maintains that he was not required to join the discrimination and the retaliation suits because the two actions arose from different circumstances at different times and present different claims against different defendants. Indeed, Fioriglio's first action challenged the procedure by which the NJDOP rescored the fire chief examination and sought to place him at the top of the eligibility list. In contrast, the second action challenged City officials failure to promote Fioriglio once he had risen to the top of the eligibility list--in effect, after time had corrected the wrong on which he based his first action.

The differences between Fioriglio's two federal actions make a colorable argument for allowing his retaliation suit to proceed despite the entire controversy doctrine. The nature of the wrongs alleged, the defendants alleged to have committed them, and the timing of the alleged wrongs all differ as between the two actions. Yet, had Fioriglio joined his claims together while both actions were pending, it would furthered the goals of the entire controversy doctrine--encouraging the final resolution of his

disputes, promoting judicial efficiency, and achieving a greater **[**14]** party fairness. Although the result is far from clear, the Court will assume for the purposes of this motion that a New Jersey state court would preclude Fioriglio's instant action under the entire controversy doctrine. Nevertheless, this assumption does not resolve the issue of whether this Court should apply the entire controversy doctrine to bar Fioriglio's retaliation suit.

Whether considered a procedural rule of joinder, or a substantive rule of preclusion (or both), the entire controversy doctrine is a New Jersey rule, not a federal one. As noted in MortgageLinq and in *State v. Minter, 116 N.J. 269, 561 A.2d 570 (1989)*, "the federal courts are considered those of another sovereign." *Minter, 116 N.J. at 279, 561 A.2d at 575.* Application of entire controversy doctrine presupposes two litigations in which the failure to join claims or parties in the first forum bars the subsequent pursuit of those claims or parties in the second and later forum. Where the first forum is a New Jersey state court, applying the entire controversy doctrine where the second forum is a federal court or the court of another state presents no conceptual problem, a least after the first forum **[**15]** has rendered its judgment. The Full Faith and Credit Act, *28 U.S.C. § 1738*, requires a federal court to give a New Jersey judgment the same preclusive effect New Jersey would give it. See Rycoline, *F.3d at , 1997 WL 142106*, at *5; *Peduto v. City of North Wildwood, 878 F.2d 725, 728 (3d Cir. 1989).*

Where the first forum's judgment is rendered by a non-New Jersey court which does not have an entire controversy doctrine, the doctrine's application is murkier, since the second forum would be asked to bar claims based on a judgment which would not bar those very same claims were they thereafter asserted in the first forum itself. In MortgageLinq, the New Jersey Supreme Court nevertheless held,

When a party deliberately chooses to fragment litigation by suing certain parties in another jurisdiction and withholds claims against other parties, a New Jersey **[*422]** Court need not later entertain

the claims against the omitted parties if jurisdiction was available in the first forum.

MortgageLinq, 142 N.J. at 338, 662 A.2d at 537. Since this result cannot be explained by notions of full faith and credit or comity, its theoretical underpinnings are **[**16]** uncertain, as Justice Pollack noted in dissent. See *id. at 348-55, 662 A.2d at 542-46.* n3 However questionable is the conceptual basis for applying the entire controversy doctrine to a case when only the second forum is a New Jersey state court and the first forum has more traditional notions of joinder, its application in cases where neither the first forum nor the second forum are New Jersey state courts stretches the doctrine to its breaking point.

In this case both the first and the second fora are the United States District **[**17]** Court for the District of New Jersey. In the first suit Fioriglio joined certain pendant state law claims to his essential federal cause of action. This Court dismissed these state claims early in the litigation as outside the applicable statutes of limitations. See Fioriglio v. New Jersey Dep't of Personnel, No. 95-3422 (D.N.J. May 21, 1996) (order dismissing state-law claims). Plaintiff no doubt could have joined his claims in this case to the first action. However, since Federal Rules of Civil Procedure 18, 19, and 20 do not (either individually or collectively) impose entire-controversy-doctrine-type joinder rules on federal court litigants, he was not required to do so.

The only real argument for applying the entire controversy doctrine to the present matter is that the original suit included state law claims which this Court decided on the merits. See *Angel v. Bullington, 330 U.S. 183, 190-91, 91 L. Ed. 832, 67 S. Ct. 657 (1947)* (deeming a dismissal on statute of limitations grounds a decision on the merits). At least one interpretation of *Erie R.R. Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938),* suggests that federal judgments on state-law issues **[**18]** should have the same impact they would have if rendered by New Jersey courts. The argument is straightforward. If the entire controversy

doctrine is part of "the substantive law of New Jersey," Rycoline, *F.3d at , 1997 WL 142106,* at *5, or at the very least outcome-determinative, then Erie, as interpreted in *Guaranty Trust Co. v. York, 326 U.S. 99, 89 L. Ed. 2079, 65 S. Ct. 1464 (1945),* gives a federal judgment on a New Jersey claim decided under a court's diversity or supplemental jurisdiction the same effect as if it were rendered by a New Jersey state court. Accordingly, the judgment dismissing plaintiff's state-law claims in the first action is the legal equivalent of a New Jersey ruling doing the same thing, such that any state or federal court in the nation should accord it the same preclusive effect that New Jersey would.

However, this argument oversimplifies the Erie choice of law inquiry. An Erie analysis involves a three-question inquiry. First, is there a valid federal statute or rule of procedure on point, such as a Federal Rule of Civil Procedure or a Federal Rule of Appellate Procedure? See *Hanna v. Plumer, 380 U.S. 460, 473-74,* **[**19]** *14 L. Ed. 2d 8, 85 S. Ct. 1136 (1965).* If so, then the federal law is to be applied even if there is conflicting state law. If not, the second question is whether the application of the state law in question is likely to determine the outcome of the lawsuit. See *id. 380 U.S. 460 at 470-71.* If the state law is not outcome-determinative, federal law is used. But if the state law is deemed to be outcome-determinative, the third question is asked: is there an overriding federal interest justifying the application of federal law? See *Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537-38, 2 L. Ed. 2d 953, 78 S. Ct. 893 (1958).* If state law is outcome-determinative and there is no countervailing federal interest, state law controls. Otherwise, federal law controls. In applying this test, courts are to be guided by the goals of the Erie **[*423]** doctrine: to prevent forum shopping and to avoid the inequities that occur when results depend on the citizenship of the parties. See *Hanna, 380 U.S. at 467-68.* See generally Erwin Chemerinsky, Federal Jurisdiction § 5.3 (2d ed. 1994).

Arguably, Federal Rules of Civil Procedure 18 through 20, governing joinder of parties and claims, **[**20]** constitute valid federal laws "on point." As one commentator has argued,

[Federal Rules 19 and 20] lay down both the maximum scope of joinder (the ceiling), and the minimum scope [of joinder] (the floor). Particularly when juxtaposed with Rule 20, Rule 19 can plausibly be regarded as a statement of federal policy concerning the extent to which it is appropriate for a federal trial court to override party autonomy. If so, that policy would be frustrated by application of state preclusion law that more tightly constrained party autonomy (by requiring more expansive party joinder), since the content of the governing preclusion law would effect trial strategy in the initial action.

Burbank, supra note 3, at 109-10. Accordingly, following the first step of the Erie analysis, the "on point" federal joinder rules should apply to federal diversity judgments notwithstanding the conflicting state joinder rule of the entire controversy doctrine. See *Hanna, 380 U.S. at 473-74.*

Assuming the federal joinder rules not "on point," the Court should still apply federal as opposed to state joinder rules. To be sure, under the second step of the Erie analysis, the decision **[**21]** to apply federal or state joinder rules is outcome-determinative in its most basic sense: if New Jersey law is applied, Fioriglio's instant action is barred under the entire controversy doctrine, whereas application of federal law would allow the case to proceed. However, an overriding federal interest justifies the application of federal law:

One of the strongest policies a court can have is that of determining the scope of its own judgments. It would be destructive of the basic principles of the Federal Rules of Civil Procedure to say that the effect of a judgment of a federal court was governed by the law of the state where the court sits simply because the source of federal jurisdiction is diversity. The rights and obligations of the parties are fixed by state law. These may be created, modified, and enforced by the state acting through its own judicial establishment. But we think it would be strange doctrine to allow a state to nullify the judgments of federal courts

constitutionally established and given power also to enforce state created rights. The Erie doctrine is not applicable here . . . .

Kern v. Hettinger, 303 F.2d 333, 340 (2d Cir. 1962) (citations **[**22]** omitted); see also *Cemer v. Marathon Oil Co., 583 F.2d 830, 831-32 (6th Cir. 1978); Aerojet-General Corp. v. Askew, 511 F.2d 710, 715-18* (5th Cir.), cert. denied, *423 U.S. 908, 46 L. Ed. 2d 137, 96 S. Ct. 210 (1975); Glick v. Ballentine Produce, Inc., 397 F.2d 590 (8th Cir. 1968);* Restatement (Second) of Judgments § 87 cmt. a.

Although the Third Circuit recently skirted this very issue, it noted, without approval or disapproval, that the majority of the courts of appeals have concluded that federal law should govern in circumstances similar to those here. See *Lubrizol Corp. v. Exxon Corp., 929 F.2d 960, 962 & n.2 (3d Cir. 1991).* The Restatement and Wright and Miller concur with this majority the rules of res judicata of a judgment of federal court."); n4 18 Charles Alan Wright et al., Federal Practice and Procedure § 4472 (1981). Accordingly, were this Court's first Fioriglio decision one resting on diversity jurisdiction, the Court would **[*424]** be inclined to follow the vast weight of authority and apply federal preclusion law.

Because the first Fioriglio decision rested on federal question jurisdiction, albeit with pendant state-law claims, deciding which preclusion law to apply becomes considerably easier. Uniform authority dictates that federal law governs the issue and claim preclusion effects of a federal judgment in a federal question case. See 18 Wright et al., supra, § 4466 ("The Supreme Court has repeatedly said that federal law controls, lower courts agree, and the commentators concur."). The state-law claims in Fioriglio's racial discrimination suit were not unrelated causes of action but rather mirror images of Fioriglio's federal law claims, springing from a common nucleus of operative facts and seeking the same relief. See *Hurley v. Atlantic City Police Dep't, 933 F. Supp. 396, 413-14 & n.14 (D.N.J. 1996)* (likening the N.J.L.A.D. to § 1983

and Title VII). These claims did not change the character of the otherwise purely federal action. In such circumstances, federal law and not the law of the state in which the federal court happens to sit should measure the preclusive effect of prior federal judgments. Accordingly, Fioriglio's racial discrimination suit does not preclude **[**24]** his instant retaliation suit under the entire controversy doctrine.

B. Entire Controversy Doctrine--Administrative Proceedings

Defendants next argue that Fioriglio's administrative proceedings before the PERC and the NJDOP bar his instant retaliation suit under the entire controversy doctrine. However, as noted above, the doctrine does not apply where "joinder would result in significant unfairness to the litigants or jeopardy to a clear presentation of the issues and a just result," *Mystic Isle, 142 N.J. at 323, 662 A.2d at 529,* or where "the first proceeding occurred before a lesser tribunal." *Petrocelli, 993 F.2d 27, 29;* see also *Cafferata v. Peyser, 251 N.J. Super. 256, 261, 597 A.2d 1101, 1104 (App. Div. 1991).* Accordingly, in determining whether the entire controversy doctrine applies to these administrative proceedings, the Court must determine whether Fioriglio could have raised his federal claims before the administrative tribunals, and whether raising such claims would have constituted a full and fair opportunity to litigate them. See *Watkins v. Resorts Int'l Hotel & Casino, 124 N.J. 398, 413-14, 591 A.2d 592, 599 (1991); Cafferata, 251 N.J.* **[**25]** *Super. at 261, 597 A.2d at 1104;* see also *Jones v. Holvey, 29 F.3d 828, 831 (3d Cir. 1994),* cert. denied on appeal after remand, *134 L. Ed. 2d 480, 116 S. Ct. 1329 (1996).*

The PERC dismissed Fioriglio's pro se unfair practice charge because it did not have the statutory authority to address his grievances. See Plaintiff's Ex. G. The PERC can only remedy discrimination regarding the exercise of rights guaranteed by the New Jersey Employer-Employee Relations Act, N.J.S.A. § § 34:13A-1 to 13A-21. Reverse discrimination and retaliation based on free speech are not among these rights. See N.J.S.A. §

34:13A-5.4; see also *Kelly v. Borough of Sayreville, 107 F.3d 1073, 1079 (3d Cir. 1997)* (McKee, J., concurring) (noting PERC's "well-established practice of refusing to hear constitutional claims except insofar as they relate to statutory claims properly before it under the Act"). Thus, not only was Fioriglio unable to raise his instant claims before the PERC, but also the PERC could not have provided him with a full and fair opportunity to litigate them. n5 Accordingly, the entire controversy doctrine does not attach to Fioriglio's PERC proceeding.

The NJDOP similarly lacked the authority to pass on Fioriglio's instant federal **[*425]** claims. The NJDOP and its Merit System Board may only interpret the application of New Jersey law to public bodies and entities. See N.J.S.A. § 11A:2-6(e); *In re Allen, 262 N.J. Super. 438, 444, 621 A.2d 87, 90 (App. Div. 1993).* Fioriglio's federal constitutional claim falls clearly outside of the NJDOP's interpretive realm. Thus, Fioriglio could not have raised his federal claims before the NJDOP nor could it have addressed them. Accordingly, the entire controversy doctrine does not attach to Fioriglio's NJDOP proceeding either.

C. Abstention

Defendants next argue that this Court should abstain from hearing Fioriglio's retaliation suit under the doctrines announced in *Burford v. Sun Oil Co., 319 U.S. 315, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943),* and *Colorado River Conservation Dist. v. United States, 424 U.S. 800, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976).* Specifically, defendants contend that this Court should not interfere with Fioriglio's pending appeal from the NJDOP to the Merit System Board.

Burford abstention applies where there is an unclear issue of state law, complex **[**27]** state administrative procedures designed to address the issue, and a particular need for centralized decisionmaking. Where, as here, there is a substantial federal question at issue, a federal court should only invoke Burford abstention if (1) the subject of regulation is of special concern to the state, (2) the state regulatory scheme is detailed and complex,

and (3) the federal issue cannot be resolved without requiring the federal court to immerse itself in the technicalities of the state scheme. See *New Orleans Public Svc., Inc. v. Council of City of New Orleans, 491 U.S. 350, 362-64, 105 L. Ed. 2d 298, 109 S. Ct. 2506 (1989);* Chemerinsky, supra, § 12.2.3.

Here, there are no complex issues of state law, the resolution of which would disrupt state efforts to establish a coherent policy on a matter of substantial public concern. Indeed, the federal issue--retaliation in violation of the First Amendment--can be resolved without addressing the technicalities of New Jersey administrative law. Accordingly, the Court will not invoke Burford abstention and refrain from hearing Fioriglio's retaliation suit. Cf. *McNeese v. Board of Ed., 373 U.S. 668, 10 L. Ed. 2d 622,* **[**28]** *83 S. Ct. 1433 (1963)* (permitting black students to challenge school segregation without first invoking state administrative procedures).

Colorado River abstention applies in "exceptional circumstances" where federal litigation essentially duplicates litigation simultaneously pending in state court. Considerations include the relative progress of the federal and state court litigations, the importance of avoiding piecemeal litigation, whether there is a congressionally declared policy that would be served by abstention, the relative inconvenience of the federal court to the parties, and whether there is a federal question being litigated. See *Colorado River, 424 U.S. at 818-19; Moses H. Cone Mem. Hosp. v. Mercury Constr. Co., 460 U.S. 1, 15-16, 25-26, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983);* Chemerinsky, supra, at § 14.2. The existence of a federal question, the Supreme Court held in Moses Cone, weighs heavily against abstention. See *Moses Cone, 460 U.S. at 25-26.*

Nothing about Fioriglio's parallel proceedings are particularly exceptional. The extent of the progress of his NJDOP proceeding is a one-sentence determination that defendants' promotion determinations **[**29]** were correct. See Plaintiff's Ex. F. No action has yet been taken on Fioriglio's appeal from that determination. More importantly, Fioriglio's retaliation suit before

this Court involves a federal question of constitutional dimension. Accordingly, the Court will not invoke the rarely applicable Colorado River abstention doctrine and refrain from hearing Fioriglio's retaliation case.

D. Defamation

Count Two of Fioriglio's complaint sets forth a defamation cause of action, for which the New Jersey statute of limitation is one year. See N.J.S.A. § 2A:14-3. His complaint alleges Whalen defamed him on May 14, 1994 and "at other various times," whereas he instituted the retaliation suit almost **[*426]** two years later on May 9, 1996. See Amended Complaint at 12. As such, defendant Whalen seeks to dismiss Fioriglio's defamation count as brought outside the statute of limitations.

Fioriglio concedes, as he must, that this action began after the applicable statute of limitations had run. He argues, however, that he instituted administrative proceedings against Whalen within the statute and thus giving Whalen notice of the defamation claim. While Whalen might have had timely notice **[**30]** of Fioriglio's defamation claim, these administrative tribunals were not authorized to decide defamation claims and proceedings before these tribunals did not toll the one-year defamation statute. Accordingly, his instant defamation claim is brought out of time and the Court will grant Whalen's motion to dismiss it.

E. N.J.L.A.D.

Count Five of Fioriglio's complaint alleges a violation of the N.J.L.A.D. in that defendants' discriminated against him on the basis of his "creed." See N.J.S.A. § 10:5-12(a) (prohibiting discrimination on the basis of "race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, sex, or atypical or hereditary cellular blood trait"). By "creed," Fioriglio means not his religion but rather the political beliefs he espoused during his campaign against Whalen for mayor. These include his beliefs that Whelan wasted City taxpayers' money and used his position as mayor to benefit his friends and political

"cronies." See generally Plaintiff's Ex. E at E-9 (setting forth his campaign platform).

While no New Jersey court has yet interpreted the N.J.L.A.D. so creatively, the federal courts have expressly **[**31]** rejected Fioriglio's argument with respect to Title VII's similar language:

A religious belief excludes mere personal preference grounded upon a non-theological basis, such as personal choice deduced from economic or social ideology. Rather, it must consider man's nature or the scheme of his existence as it relates in a theological framework. Furthermore, the belief must have an institutional quality about it and must be sincerely held by plaintiff.

Edwards v. School Bd., 483 F. Supp. 620, 624 (W.D. Va. 1980), vacated and remanded on other grounds, *658 F.2d 951 (4th Cir. 1981).* Because the New Jersey courts have often looked to Title VII jurisprudence to resolve questions under the N.J.L.A.D., see Lehmann v. Toys *'R' Us, Inc., 132 N.J. 587, 624-25, 626 A.2d 445, 464-65 (1993),* and because this Court highly doubts that the Supreme Court of New Jersey would accept Fioriglio's "creed" argument, the Court will dismiss his N.J.L.A.D. claim for failure to state a claim upon which relief can be granted.

F. Remaining Arguments

Defendants' remaining arguments address the factual contentions contained in Fioriglio's complaint. As such, the arguments are **[**32]** best left to motions for summary judgment or trial. Accordingly, the Court will deny defendants' factual challenges to Fioriglio's remaining claims.

III. CONCLUSION

Because New Jersey's entire controversy doctrine does not bar Fioriglio's instant action, the Court will deny defendants' motions to dismiss in part. Because Fioriglio's defamation count was brought outside the statute of limitations and because his

N.J.L.A.D. count fails to state a claim upon which relief can be granted, the Court will grant defendants' motions in part. An appropriate order will issue on even date herewith.

Date: MAY 6, 1997

JOSEPH E. IRENAS, U.S.D.J.

----------Footnotes----------

n1 In a recent opinion, the Third Circuit characterized the entire controversy doctrine as closely related to traditional res judicata principles and held that like res judicata, the entire controversy doctrine requires some measure of judicial finality before it can be applied. See *Rycoline Prods., Inc. v. C & W Unlimited, 109 F.3d 883, 1997 WL 142106 (3d Cir. 1997)*. However, the entire controversy doctrine developed from and is more closely related to mandatory joinder rules. See *Cogdell, 116 N.J. at 20* ("We perceive . . . that the commonality of purposes in both the party-joinder and claims-joinder rules indicates that they are conceptual subsets of the entire controversy doctrine."). Indeed, from 1979 until 1990, when Rule 4:30A was adopted, the entire controversy doctrine appeared in N.J. Ct. R. 4:27-1(b) ("Joinder of Claims"). Rule 4:30A refers to the "Non-joinder of claims and parties." While the wellspring of res judicata or collateral estoppel is the notion of finality of a court's adjudication, the entire controversy doctrine is designed to prevent the fragmentation of litigation and applies even when the first case adjudicates an issue different from the second. See *MortgageLinq v. Commonwealth Land Title Ins. Co., 142 N.J. 336, 348, 662 A.2d 536, 542 (1995)* ("[A] dismissal for failure to comply with the entire controversy doctrine is more similar to a threshold adjudication than to an adjudication on the merits of the claim.").

n2 In Rycoline, the Third Circuit held that the entire controversy doctrine does not preclude the initiation of a second litigation before a related first action has been concluded. However, the Rycoline Court did not reach the question posed by the present

case, namely, whether the doctrine can be utilized to dismiss a second action where two actions had been pending simultaneously and the first action was later dismissed. See Rycoline, *F.3d at n.2, 1997 WL 142106,* at *11 n.2.

n3 Excellent, if slightly esoteric, discussions of the problems in applying the entire controversy doctrine when the first forum and the second forum are not New Jersey Courts may be found in Stephen B. Burbank, Where's the Beef? The Interjurisdictional Effects of New Jersey's Entire Controversy Doctrine, *28 Rutgers L.J. 87 (1996),* and Rochelle Cooper Dreyfuss & Linda J. Silberman, Interjurisdictional Implications of the Entire Controversy Doctrine, *28 Rutgers L.J. 123 (1996).*

n4 The reporter for the Restatement explains the American Law Institute position:
Many cases have said flatly that when the federal court sits in diversity jurisdiction, the law of the state where it sits determines the res judicata effects of the federal judgment. This seems plainly wrong when it comes to the elements of finality, and the better reasoned cases have so recognized.
Restatement (Second) of Judgments § 87 cmt. b (citing Kern, Aerojet, and Glick).

n5 Notwithstanding the limited scope of PERC hearings, the district court in *Kelly v. Borough of Sayreville, 927 F. Supp. 797 (D.N.J. 1996),* found that plaintiff Kelly "could have" and should have "raised his federal claims before [the] PERC" and barred him under the entire controversy doctrine from thereafter litigating his claims in federal court. *Id. at 803.* The Kelly court considered Kelly's PERC hearing a "full and fair opportunity to litigate" his constitutional claims, a decision with which this Court respectfully disagrees. Id. The Third Circuit affirmed Kelly without reaching the entire controversy doctrine issue, but it expressed "significant reservations concerning the district court's disposition of that issue." *Kelly v. Borough of Sayreville, 107 F.3d 1073, 1075 (3d*

Cir. 1997). Addressing the issue in a concurrence, Circuit Judge McKee found the district court's analysis to be in error. See *id. at 1078-80* (McKee, J., concurring).

Kim D. Fiorigtio

v.

City of Atlantic City, James Whelan, Paul Gallagher, Benjamin Brenner, Terrence

Mooney, Dennis Brooks, Atlantic City Firefighters' Local 198, Joseph Rush, John

Doe(s) 1-50, Fictitious Name(s) as Individuals, ABC Corporation(s), 1-50

Fictitious Name(s), as Corporation and/or Entities, i/j/s/a

NO. 98-5240

United States Court of Appeals,

Third Circuit.

~~October~~ 8, 1999

ORDER

(Becker, Chief Judge, Sloviter, Mansmann, Greenberg, Scirica, Authoring Judge, Nygaard, Alito, Roth, McKee, Rendell, Circuit Judges) denying petition for rehearing by Appellant.

No. 99-651

IN THE

Supreme Court of the United States

KIM D. FIORIGLIO,

Petitioner,

v.

CITY OF ATLANTIC CITY, JAMES WHELAN, PAUL GALLAGHER, BENJAMIN BRENNER, TERRENCE MOONEY, DENNIS BROOKS, ATLANTIC CITY FIREFIGHTERS LOCAL 198, JOSEPH RUSH, JOHN DOE(S) 1-50, fictitious names(s) as individuals, and ABC CORPORATION(S) 1-50, fictitious names(s) as corporations and/or entities, i/j/s/a,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT BENJAMIN BRENNER

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PARTIES TO THE PROCEEDING

The parties to the proceeding are Kim D. Fioriglio, as Petitioner, and the City of Atlantic City, James Whelan, Paul Gallagher and Benjamin Brenner as Respondents.

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OPINIONS BELOW

In addition to the opinions cited by Petitioner[1], the United States District Court for the District of New Jersey also denied Petitioner's Motion for Relief from Judgment under Rule 60(b) to open up the Judgment and include additional certifications by opinion dated April 8, 1998. The April 8, 1998 opinion is set forth in Appendix R1a.

STATEMENT OF THE CASE

Petitioner took a written examination on September 22, 1990, given by the New Jersey Department of Personnel ("DOP") for the position of Battalion Fire Chief for the City of Atlantic City, and an oral examination on November 21, 1991.

On November 20, 1992, after the tests had been rescored, the DOP posted results of the Battalion Chief test which indicated that Petitioner was in a four way tie. In 1993, one candidate was promoted to Battalion Chief due to veteran's preference, which left Petitioner in a three way tie for first for Battalion Chief with Terrence Mooney ("Mooney") and Daniel Tamburilla ("Tamburilla").

On February 1, 1994, Petitioner decided to run for Mayor of Atlantic City against Respondent, James Whelan ("Whelan or Mayor"). During the campaign, Petitioner alleges that he revealed a number of improprieties and irregularities associated with Mayor Whelan's administration. On May

1. The opinion of the Third Circuit dated June 8, 1999 and reported at 185 F.3d 861 and the opinions of the District Court of New Jersey dated March 5, 1998 and May 7, 1997 and reported at 966 F. Supp. and 963 F. Supp. 415, respectively.

12, 1994, Mayor Whelan was elected to his second term. Petitioner was a minor candidate for Mayor who handed out one campaign flyer. Mayor Whelan received over 5,000 votes. Petitioner received under 200 votes.

In October 1994, the DOP issued new guidelines for the Disposition of a Certification. N.J.A.C. 4A:4-4.8. The new guidelines required officials with appointment authority to provide a statement of the reasons why an appointee would be selected over another appointee in the case of a tied score. In response to the new guidelines and at the urging of Respondent Benjamin Brenner, the Chief of the Fire Department ("Brenner"), Mayor Whelan enacted Executive Order #3 of 1994. The Executive Order provided that the appointing authority should consider six criteria in breaking ties, which were disciplinary history, education, sick leave abuse, diversity, residency, and raw score. Previously, ties were broken alphabetically.

In December 1994, based on Executive Order #3 of 1994 and his own evaluation of the three tied candidates, Brenner recommended to Whelan that Mooney and Tamburilla be selected as Battalion Chiefs.

SUMMARY OF ARGUMENT

Petitioner fails to point to any evidence of any conspiracy against him because he ran for mayor and received under 200 votes. All Petitioner has shown or can show is: (1) that he ran for mayor; (2) subsequently the City changed its tie-breaking policy from alphabetical and/or residency to one requiring consideration of six factors: education, disciplinary history, raw scores, residency, and diversity; and (3) Petitioner was not promoted to Battalion Chief.

Petitioner's entire case is based on those undisputed facts. There is absolutely no direct or indirect evidence that the failure to promote him was in even the slightest way related to his political campaign.

Petitioner offered no direct evidence to establish that his failure to receive the promotion was retaliatory. Petitioner's circumstantial proof was also woefully inadequate. Petitioner alleges that Whelan, Brenner and Paul Gallagher ("Gallagher"), the city solicitor, all conspired to deprive him of his rights because he ran for mayor and received 186 votes. He alleged that this conspiracy was hatched at a meeting among the conspirators, but Petitioner himself testified under oath that he has no knowledge that such a meeting ever took place or what was discussed at such meeting.

The "smoking gun" for this conspiracy is that Gallagher, in response to a regulatory mandate from the DOP, drafted an executive order scrapping the old policy of breaking ties among possible civil service promotees alphabetically and substituting the consideration of the six criteria. Once again, Petitioner offered no evidence to establish that this action, which was mandated by DOP, was retaliatory.

As detailed below, there is no reason for this Court to review this case which has now been rejected by the District Court twice and also by the Third Circuit. The Third Circuit also rejected a request for a hearing *en banc*. Petitioner has distorted the facts of this case and the law to be applied in this case. There is no conflict among the circuits and the standards for political retaliation have been established for over 20 years.

A. Petitioner misrepresents and distorts the facts of the case before the District Court.

Petitioner misrepresents or omits essential facts in this case. First, Petitioner argues that in order to establish a *prima facie* case of discriminatory treatment under the McDonnell Douglas framework under Section VII of the Civil Rights Act of 1964 "that the Plaintiff must prove: (i) he/she belongs to a racial minority . . .". Petitioner then states that he was a **minority** because he was **"in the minority of [those] not supporting the Mayor for reelection."**[2] Pet. 5-6. Petitioner is not a minority and fails to cite any case law to support his statement that those who do not support the incumbent mayor are considered a "minority" for Title VII purposes.

Second, Petitioner states that "the Petitioner demonstrated the continuous comments the city officials made against him . . ." Pet. 5. Not only did Petitioner fail to demonstrate continuous comments, Petitioner failed to establish any comment in the record that city officials made against him. The only comments that were made against him cited by Petitioner were unsigned, unsworn statements which were inadmissible and contained hearsay. These statements were not considered by the District Court for failure to comply with court rules.

Third, Petitioner states that the "Mayor changed the hiring process just so that he did not have to promote the

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2. This argument is frivolous. Supreme Court Rule 42.2 provides that "when a petition for a writ of certiorari . . . is frivolous, the Court may award the respondent or appellee just damages, and single or double costs under Rule 43. Damages or costs may be awarded against the petitioner, appellant, or applicant, against the party's counsel, or against both party and counsel."

Petitioner." Pet. 6. This is incorrect and distorted. The Mayor did not change the hiring process. The Mayor changed the tie-breaking process in response to a mandate from the DOP requiring the appointing authority to specify reasons as to why when two candidates are tied, the appointing authority selects one candidate over another. In response to that state mandate, the Mayor changed the tie-breaking policy from alphabetical to a tie-breaking process based upon six criteria. Nowhere in Petitioner's brief does he mention the state mandate to issue new guidelines for the tie-breaking policies.

Fourth, Petitioner states that the "mayor . . . in fact, hired two other people who did not score as high as the Petitioner." Pet. 6. Petitioner fails to mention that he was not alone in first place. Petitioner was in a three way tie for the first with two other candidates. The Mayor followed the recommendation of Brenner to select two candidates who were tied for first with the petitioner. The other two candidates were selected because they better qualified.

B. Petitioner misstates that he submitted sufficient evidence to show the nexus between his protected speech and his failure to receive the promotion to Battalion Chief.

The Trial Court was correct in holding that Petitioner failed to set forth any facts or communication which shows any connection between his run for mayor and a § 1983 conspiracy to deny him a promotion. Petitioner cannot maintain a claim of civil conspiracy against Respondents based upon his unsubstantiated theory that Respondents conspired to bypass him from promotion to Battalion Chief because he ran for mayor against Whelan.

A section 1983 conspiracy claim is a conspiracy to violate a right protected by section 1983; in other words, a conspiracy to deprive a plaintiff of a constitutional or federally protected right under color of state law. *Dixon v. City of Lawton, Okla.*, 898 F.2d 1443, 1449 n.6 (10th Cir. 1990). *Daniels v. Williams*, 474 U.S. 327, 330-32 (1986). To prove a conspiracy a violation of section 1983, a plaintiff "must show that the parties reached an understanding to deny the plaintiff his or her rights [and] prove an actionable wrong to support the conspiracy." *Bendiburg v. Dempsey*, 909 F.2d 463, 468 (11th Cir. 1990), *cert. denied*, 500 U.S. 932 (1991). "The linchpin for conspiracy is agreement, which presupposes communication. . . ." *Bailey v. Board of County Commrs of Alachua County*, 956 F.2d 1112, 1122 (11th Cir. 1992).

The plaintiff must make specific factual allegations of a combination, agreement or understanding among all or between any of the defendants to plot, plan or conspire to carry out the alleged chain of events in order to deprive plaintiff of a federally protected right. *See Darr v. Wolfe*, 767 F.2d 79, 80 (3d Cir. 1985); *Ammlung v. City of Chester*, 494 F.2d 811, 814 (3d Cir. 1974). Inferences based on speculation and conjecture are insufficient to create a factual dispute and defeat a summary judgment motion. *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 383 n.12 (3d Cir. 1990); *Blackston v. Shook & Fletcher Insulation Co.*, 764 F.2d 1480, 1482 (11th Cir. 1985).

Petitioner alleges that the Respondents conspired to deprive him of a promotion by changing the factors by which ties are broken from alphabetical to six different criteria. The six criteria are disciplinary history, education, sick leave abuse, diversity, residency and raw score. Petitioner

speculates that the reason for the change in factors used to break ties was not in response to a newly enacted personnel regulation N.J.A.C. 4A:4-4.8, which requires that the appointing authorities state the reasons for their appointment choices in the case of a tied score, but rather because he ran as a candidate against Whelan in May 1994. However, all Petitioner has is speculation and conjecture built upon inferences. When asked what he bases his speculation upon, Petitioner admitted that its all assumptions and speculation. He admitted he had absolutely no facts to support his assumptions. Petitioner also admitted that the newly adopted tie-breaking criteria are appropriate considerations in deciding who to promote.

Petitioner's theory is that the Respondents conspired against him: (i) during a meeting that he has absolutely no knowledge, proof or evidence even took place or what, if anything was discussed; (ii) that they adopted rational promotional criteria that in no way discriminates against him or is biased against him; (iii) that Brenner did not promote him in order to retaliate for a Mayor with whom Brenner had absolutely no political connection. Petitioner has no proof, no evidence, no piece of paper, no facial gesture, no words, and no conduct to support his theory . . . he has only his theory.

Petitioner has not established any nexus between his run for mayor and failure to be promoted. Just because Petitioner was not promoted and ran for mayor, does not establish a causal link between the two. It is Petitioner's burden to establish some connection between the two events. The reason he was not promoted was simply because he was not the best candidate. He did not measure up to the rest of the candidates based on the six criteria, a fact that Petitioner

freely admitted. His non-appointment had nothing to do with the fact that he ran for mayor and received less than 200 votes. To suggest otherwise is to make every third-party mayoral candidate who is also a city employee immune to subsequent adverse personnel decisions.

C. The burden of proof in First Amendment Retaliation cases is well established and was correctly applied in this case.

Petitioner argues that this case is worthy for review because the Trial Court applied a different standard than that enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This Court in *McDonnell Douglas* established the standard for establishing a *prima facie* case of discriminatory treatment based upon circumstantial evidence for cases under Title VII. The Trial Court applied the proper standard in dismissing Petitioner's claim for retaliation in violation of his rights under the First and Fourteenth Amendments. The Trial Court analyzed plaintiff's proofs to determine whether Petitioner was able to show:

1. that he engaged in protected activity, i.e. protected speech; and

2. that the protected speech was a substantial or motivating factor in the alleged retaliatory action.

See Petitioner's Appendix pg. 11a-12a.

Once a plaintiff meets this burden, the defendant may defeat the plaintiff's claim by demonstrating by a preponderance of the evidence that the same action would have been taken even in absence of the protected conduct.

Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). The Trial Court never reached this issue because Petitioner produced absolutely no evidence that his protected activity was a substantial or motivating factor in the alleged retaliatory action.

According to Petitioner, "lower courts are unsure how to weigh evidence of political discrimination cases" because the *McDonnell Douglas* test is not applied to political discrimination cases. Pet. 8. Petitioner cites no authority to show that this problem exists, but then jumps to the conclusion that "[t]he role of this Court is to establish a uniformity as to the burden of proofs and persuasion in a political discrimination cases."[3] *Id.*

Despite Petitioner's conclusory assertions to the contrary, there is no uncertainty among lower courts regarding the standard to be applied in political retaliation cases. This Court established the proper standard more than twenty years ago in the *Mt. Healthy* decision. That standard was properly applied by the Trial Court and Respondents' Motion for Summary Judgment was properly granted.

As stated previously, Petitioner's claim was dismissed because he produced absolutely no evidence of any casual connection between Petitioner's failed mayoral campaign and his failure to receive the promotion to Battalion Chief. Petitioner did not produce a scintilla of evidence below that the denial of promotion was retaliatory. Petitioner's claim

3. It should be noted that the cases cited by Petitioner are cases where political discrimination based upon political affiliation was at issue. Petitioner's claim and the standard used by the Trial Court is for retaliation based upon specific political speech, not party affiliation, a slightly different standard.

would fail under any standard of proof because he cannot establish any link between his protected activity and the alleged retaliatory action. The Trial Court properly applied the correct standard, the standard enunciated by this Court more than two decades ago, and dismissed Petitioner's claim.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED APRIL 8, 1998 AND FILED APRIL 9, 1998

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HONORABLE JOSEPH E. IRENAS

CIVIL ACTION NO. 96-2295 (JEI)

KIM D. FIORIGLIO,

Plaintiff,

v.

CITY OF ATLANTIC CITY, JAMES WHELAN, PAUL GALLAGHER, BENJAMIN BRENNER, and JOSEPH RUSH,

Defendants.

OPINION

* * *

IRENAS, District Judge:

Presently before the Court is the motion of plaintiff, Kim Fioriglio ("Fioriglio"), asking for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure. Because we do not find that the attorney error which occurred in this matter constitutes mistake, inadvertence or excusable neglect sufficient under Rule 60(b) to grant plaintiff relief, *see* Fed. R. Civ. P. 60(b), we will deny plaintiff's motion.

Appendix

I. BACKGROUND

On March 5, 1998, we granted summary judgment to all defendants on all remaining counts in this action and dismissed plaintiff's complaint in its entirety. The underlying facts of this case can be found in that opinion. *See Fioriglio v. City of Atlantic City*, __ F. Supp. __, 1988 WL 111323 (D.N.J. March 5, 1998). In reaching our decision as to summary judgment, we refused to consider three unsworn, unsigned statements submitted by plaintiff in support of his opposition to summary judgment. We stated:

> [F]or a statement to be admissible, it must be made under oath and on personal knowledge, it must set forth facts which would be admissible in evidence, and it must show that the affiant is competent to testify to the matters stated therein. Plaintiff asks us to consider transcripts of statements allegedly made by fellow firemen and tape recorded by plaintiff for purposes of this litigation. Plaintiff submits these taped statements as proof of comments allegedly made by Whelan which might show the Mayor's retaliatory motives in not promoting plaintiff. In one comment, allegedly made to another fire captain, the Mayor supposedly said "you firemen always want something and you go and support that asshole Fioriglio for Mayor against me and then you think I am going to give an appointment." The other two declarants supposedly overheard the Mayor say: "F--ck you, F--ck you, you fireman and f--ck that Fioriglio, he will never be Mayor" and "Kim

> would never be promoted as long as [I am] Mayor." However, none of the statements are sworn to or signed by the alleged speakers. They were not given under oath and neither plaintiff nor his attorney has submitted an affidavit attesting to the transcripts' validity. Thus, these statements fail to meet the requirements of Fed.R.Civ.P. 56(e), and we will not consider them for purposes of summary judgment.

Id. at *4.

Plaintiff now seeks, through the relief afforded by Rule 60(b) of the Federal Rules of Civil Procedure, to introduce the certifications of two of the firemen attesting to the accuracy of the taped statements originally submitted unsworn and unsigned. The first is the certification of Wayne Gotwalls, undated, attesting to the written statement he gave to plaintiff's attorney on December 2, 1996, and the second is the certification of James Boyer, dated March 11, 1998, attesting to the written statement he gave to plaintiff on September 4, 1996. No certification was submitted as to the statement of the third fireman, Scott McKnight, allegedly given to plaintiff's attorney on May 28, 1996.

The facts surrounding plaintiff's attorney's failure in his opposition papers to submit the certifications for the three statements or otherwise have them sworn are as follows. By order of Magistrate Judge Rosen, all dispositive motions in this case were to be filed no later than December 1, 1997. However, as the result of the unfortunate death of one of the family members of the defense, discovery and dispositive

motion deadlines were extended beyond that date. On January 6, 1998, having received the summary judgment motion papers of the defendants, plaintiff's attorney sent out copies of plaintiff's papers in opposition to defendants' motions for summary judgment. These papers were sent out in somewhat of a hurried fashion as plaintiff's attorney believed he had more time to respond but was receiving complaints from his adversaries. These papers contained the three unsworn, unsigned statements.

Shortly after he sent out plaintiff's response, plaintiff's attorney received a copy of the reply brief of defendant Brenner, in which Brenner's attorney objected to the use of the unsworn statements and asked the Court not to consider them. Although plaintiff's attorney focuses solely on the Brenner brief, it appears he may have been put on notice of the defendants' objections to the statements earlier. Under cover letter dated December 4, 1997, defendant Gallagher objected to the use of the statements as hearsay in his proposed pre-trial order. Also dated December 4, 1997, defendant Atlantic City provided plaintiff's attorney with a proposed pre-trial order objecting to the use of the statements because they were obtained in violation of The Rules of Professional Conduct. Finally, under cover letter dated January 9, 1998, plaintiff's attorney received a proposed pre-trial order of defendant Whelan which objected to the use of the three statements as "hearsay."

Plaintiff's attorney alleges that, in response to Brenner's brief, he wrote a memorandum to his former secretary/ paralegal indicating that they needed to have the unsworn statements attached to the summary judgment motion sworn.

Appendix

The memo is addressed to "Sue" from "Dan" (plaintiff's attorney) and is undated. It states:

> Make sure that you attach Page 7 of the Gotwalls Deposition and Page 10 of the Boyer Deposition and send the same under cover letter to the Court indicating that we have certified the statements. Before you do this, double check the file to see if Kevin Moses [the lawyer who recorded two of the statements] had done an attestation clause or some type of certification clause to the statements he took. I told him to do this, I don't know why they were not attached. Also, have Kim go out and give Certification pages to Boyer, Gotwalls and McKnight. I do not see where we have a Deposition of McKnight so this will probably be the most important one to get certified.
>
> Do this immediately. It is a little bit embarrassing to have Donnelly [Brenner's attorney] point this out in his Brief that we have omitted to do this.

Exh. 3 to Perskie Certif. Plaintiff's attorney assumed that his former secretary/paralegal obliged with his request and cured the deficiency by getting certifications. Shortly after he gave her the memo, however, she quit his employ and went back to North Jersey to work with her old law firm. No certifications or pages from the Gotwalls and Boyer depositions were submitted to this Court prior to the date upon which we granted summary judgment. We did not receive the two certifications and deposition pages until March 19, 1998, at which time the instant Rule 60(b) motion was received in Chambers.

Plaintiff's attorney has assumed full responsibility for the oversight in not getting attestations to the three unsworn statements. After receiving our opinion of March 5, 1998, he asked Fioriglio to get certifications from each of the three firemen, in particular from McKnight, who did not testify at a deposition. With his motion for Rule 60(b) relief, he submitted Page 7 of Gotwalls' deposition and Page 10 of Boyer's deposition, where each deponent, under oath, attested to the accuracy of the statements in question. Signed certification by these men were also submitted. In Gotwalls' certification, Gotwalls attested to statement he allegedly gave on December 2, 1996. However, in his deposition, he testified about giving a statement in August 1996.

Nothing has been submitted by McKnight. Plaintiff's attorney claims that he asked Fioriglio to go to McKnight and have him attest to his statement. However, because of a personal problem between Fioriglio and McKnight, McKnight has refused on two occasions to sign a certification.

II. DISCUSSION

Rule 60(b) of the Federal Rules of Civil Procedure contains six numbered clauses that list grounds on which a court may relieve a party from an otherwise final judgment. These grounds are:

> 1. Mistake, inadvertence, surprise, or excusable neglect.

2. Newly discovered evidence that a party, even exercising due diligence, could not have discovered in time to move for a new trial.

3. Fraud . . . , misrepresentation, or other misconduct of an adverse party.

4. Voidness of the judgment.

5. Satisfaction, release, or discharge of the judgment, or when a prior judgment that is the basis for the current judgment is reversed or otherwise vacated, or it is no longer equitable that the judgment continue to have prospective application.

6. Any other reason that justifies relief from the judgment.

Fed. R. Civ. P. 60(b)(1)-(6).

Here, plaintiff's attorney is seeking relief under the first ground: mistake, inadvertence, surprise or excusable neglect. Fed. R. Civ. P. 60(b)(1). It is well-established that Rule 60(b) relief is an extraordinary remedy and is granted only in extraordinary circumstances. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988); *Moolenaar v. Gov't of Virgin Islands*, 822 F.2d 1342, 1346 (3d Cir. 1987); *Marshall v. Board of Educ.*, 575 F.2d 417, 425 (3d Cir. 1978); *Martinez-McBean v. Government of the Virgin Islands*, 562 F.2d 908, 911 (3d Cir. 1977); *Stradley v. Cortez*, 518 F.2d 488, 493 (3d Cir. 1975). The decision as to whether relief

should be granted under Rule 60(b) is committed to the sound discretion of the court. *See Laskey v. Continental Prods. Corp.*, 804 F.2d 250, 256 (3d Cir. 1986); 12 Moore's Federal Practice ¶ 60.22[1]. The discretion is not an arbitrary one, but a sound legal discretion guided by accepted legal principles. *Id.*

Plaintiff's attorney bases his motion for relief under Rule 60(b) on his "mistake, inadvertence or excusable neglect" in submitting the three unsworn, unsigned statements to this Court in support of his opposition to the defendants' motions for summary judgment. He argues that he failed to include certifications by the firemen making the statements in his opposition papers because he believed his paralegal had addressed these deficiencies. This, he claims, is sufficient excusable neglect or inadvertence to justify relief under Rule 60(b).

Excusable neglect involves circumstances that are unique or extraordinary. *U.S. v. Fraya, S.E.*, 170 F.R.D. 346, 348 (D. P.R. 1997). Ignorance or carelessness of an attorney generally does not constitute excusable neglect under Rule 60(b). *Robinson v. Armontrout*, 8 F.3d 6, 7 (8th Cir. 1993). For example, courts have held that simple carelessness in failing to read motions or other legal papers is not excusable neglect. *See, e.g., Kunik v. Racine County*, 106 F.3d 168, 171, 173-74 (7th Cir. 1997) (counsel's signing summary judgment brief without reading it and without reviewing the record to find supporting evidence is not the kind of excusable neglect contemplated by Rule 60(b)); *In re Four Seasons Securities Litigation*, 502 F.2d 834, 839, 842 & n.6 (10th Cir. 1974 (failure to read court's order is "neglect . . .

deemed, properly we think, inexcusable under Rule 60(b)(1)").

Other courts have concluded that the types of attorney error which occurred here do not constitute mistake, inadvertence or excusable neglect. In *Hall v. Daka Intern, Inc.*, 172 F.R.D. 19 (N.D.N.Y. 1997), the court held that an attorney's failure to obtain, prior to judgment, an affidavit purportedly supporting the employee's age discrimination claim, did not constitute mistake, inadvertence, or excusable neglect that would entitle the employee to relief from judgment, where the employee was aware, well before judgment, of the existence of the affiant and that the affiant might offer probative evidence on the age discrimination claim.

In *Fraya, S.E.*, 170 F.R.D. at 349, the court addressed the issue of whether an attorney's mistaken belief of actions supposed to have been taken by his secretary constituted excusable neglect. The court held that an attorney's mistaken belief that his secretary had timely filed a motion for enlargement of time to respond to a motion for summary judgment did not constitute excusable neglect and did not justify granting relief under Rule 60(b).

Under the facts of this case, it would not be appropriate for the court to relieve the plaintiff from the general rule that litigants are bound by the acts of their attorneys. *See Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-34 (1962). First, it appears that plaintiff's attorney may have been on notice as to the deficiency of the three statements as much as a month before he filed plaintiff's brief in opposition to

the summary judgment motions. The pretrial orders of both Gallagher and Atlantic City, dated December 4, 1997, objected to the use of the statements because they were hearsay and because they violated the Rules of Professional Conduct.[1] Second, even if he was not alerted to the fact that the statements were unsworn, and therefore not proper for consideration, until after reading Brenner's brief, he still had adequate time to ensure the defects were corrected. The return date for the motion was February 20, 1998. Even beyond that date, plaintiff's attorney could have requested the Court to hold off on rendering its decision until he was able to obtain the statements.

Finally, the deficiencies have still not been entirely corrected. The Court must continue to disregard the statement of McKnight as it remains unsworn and unsigned. McKnight's refusal to attest to any alleged statement he may previously have given raises further suspicion as to the validity and credibility of the statement itself. In addition, the undated certification and deposition testimony given by Gotwalls are inconsistent. In the certification, Gotwalls claims he gave the statement on December 2, 1996. In his deposition testimony, he stated that the statement was given in August 1996. The transcript of the statement notes the date as August 2, 1996. Thus, the Court is reluctant to consider the Gotwalls statement as competent evidence.

We do not believe that Rule 60(b) relief is warranted here. Plaintiff's attorney's error did not constitute the type of mistake, inadvertence, or excusable neglect sufficient to

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1. We need not reach, and thus are not making any judgment on, the ethical issues that maybe implicated under the Rules of Professional Conduct.

reopen this case, reconsider the four separate motions for summary judgment, reexamine the voluminous record, conduct further research and write another opinion regarding claims which we find, even with consideration of the statements, specious at best. Before relief can be given, courts routinely require the moving party to demonstrate that it has a meritorious claim or defense. *See United States v. $ 55,518.05 in U.S. Currency*, 728 F.2d 192, 195-97 (3d Cir. 1984); *N.A.A.C.P. v. Township of West Orange*, 786 F. Supp. 408 (D.N.J. 1992); 12 Moore's Federal Practice ¶ 60.24[1]. The moving party must convince the court "that vacating the judgment will not be an empty exercise." *Local 59 v. Superline Transp. Co.*, 953 F.2d 17, 20 (1st Cir. 1992). Plaintiff here has failed to convince us that vacating the judgment will be anything but "an empty exercise."[2] We feel

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2. We note that even if we were to consider the statements of Gotwalls and Boyer, the two statements for which certifications have been given, we would still conclude that plaintiff's evidence cannot support his claims under 42 U.S.C. § 1983, the New Jersey Constitution, the New Jersey Conscientious Employees Protection Act or state tort law. Gotwalls stated that the vice president of the firefighter union, and a defendant in this action, Joe Rush, told him that Mayor Whelan told Rush that "Kim would never be promoted as long as he was mayor." This statement is inadmissible hearsay and cannot be considered. Boyer's statement is equally unhelpful; it also contains some hearsay and is extremely ambiguous. At one point Boyer stated that the Mayor told him "you firemen always want something and then you go and support that 'asshole' Firillo [sic] for mayor against me and then you think I am going to give you an appointment" and "I will never appoint that asshole as long as I am mayor in the City of Atlantic City." The first part of the Mayor's comments reflect the Mayor's anger at the firemen for supporting Fioriglio, his anger at Boyer, and his intention not to

(Cont'd)

it is wiser not to waste judicial resources and further hamper the orderly administration of justice. Accordingly, we will deny plaintiff's motion for relief from judgment under Rule 60(b).

III. CONCLUSION

For the foregoing reasons, we find that the failure of the plaintiff's attorney to correct the deficient unsworn statements prior to our decision in this matter does not constitute mistake, inadvertence or excusable neglect under Rule 60(b). Therefore, we will deny plaintiff's motion for relief from judgment. Accordingly, plaintiff's complaint remains dismissed, in its entirety, with prejudice.

Date: April 8, 1998 s/ Joseph E. Irenas
JOSEPH E. IRENAS, U.S.D.J.

(Cont'd)
appoint Boyer. The second part reflects the Mayor's dislike for Fioriglio and his intention not to appoint him either. Later in his statement, Boyer related hearsay where other firemen stated that the Mayor said he hated Fioriglio and the firefighters because they backed Fioriglio. Finally, Boyer concluded his statement by adding that, during the same conversation where the Mayor told him "I will never appoint that asshole," the Mayor told him "listen, I have nothing against him, I have always liked Kim, I worked with him on the beach." We find this testimony to be very confusing and ambiguous. Furthermore, even if the Mayor really did hate Fioriglio, under New Jersey's "Rule of Three," N.J.A.C. § 4A:4-4.8(a)(3), the mayor has the authority to appoint whichever candidate of the top three eligible candidates he chooses. Thus, even if we were to consider the statements which plaintiff is seeking to introduce through Rule 60(b), we would still grant summary judgment to the defendants and dismiss plaintiff's complaint with prejudice.

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 99-651

IN THE

Supreme Court of the United States

KIM D. FIORIGLIO,

Petitioner,

v.

CITY OF ATLANTIC CITY, JAMES WHELAN, PAUL GALLAGHER, BENJAMIN BRENNER, TERRENCE MOONEY, DENNIS BROOKS, ATLANTIC CITY FIREFIGHTERS LOCAL 198, JOSEPH RUSH, JOHN DOE(S) 1-50, fictitious names(s) as individuals, and ABC CORPORATION(S) 1-50, fictitious names(s) as corporations and/or entities, i/j/s/a,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MAYOR JAMES WHELAN

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STATEMENT OF THE CASE

Petitioner, Kim Fioriglio, claims that Respondent, Mayor James Whelan, conspired with the other defendants to prevent his promotion to Battalion Fire Chief because he ran for Mayor of Atlantic City against Respondent Whelan. Petitioner's complaint included an action for conspiracy under 42 U.S.C. § 1983 based on a First Amendment violation. The Petitioner has not argued that the grant of Summary Judgment as to his other claim, i.e., state claims for defamation and tortious interference with his business activities, claims under the New Jersey Constitution to free speech and expression, New Jersey Law Against Discrimination and the New Jersey Conscientious Employee Protection Act, were incorrectly decided.

The City of Atlantic City (City) is a municipal corporation within the jurisdiction of New Jersey Department of Personnel (hereinafter "NJDOP"). All appointments and promotions made by the City are from a list generated by the NJDOP. The City had some discretion to decide who to promote. Under the "Rule of Three", N.J.S.A. 11A:4-8, the City can, with limited exceptions such as veteran's preferences, appoint any of the top three candidates. (App. 7a-9a))[1] The City also has the discretion to choose among candidates when there is a tie. *Id.*

On September 22, 1990, Petitioner took the written examination given by the NJDOP for the position of Battalion Fire Chief for Atlantic City. (App. 3a) On November 21, 1991, he took the oral portion of the examination, which is calculated into the candidates test score. (*Id.*)

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1. "App" refers to documents in Petitioner's Appendix.

After the examination, Petitioner was ranked first on the list. (*Id.*) The list was subsequently revised by NJDOP. On November 20, 1992, the NJDOP posted the results and Petitioner ended up in a four way tie with Dennis Brooks ("Brooks"), Terrence Mooney ("Mooney") and Daniel Tamburilla ("Tamburilla"). (App. 4a) All four were Captains in the Atlantic City Fire Department. In 1993, due to a veteran's preference, Brooks was promoted to Battalion Fire Chief. (*Id.*) Thereafter, a three-way tie existed between the remaining candidates.

James Whelan has been the Mayor of Atlantic City since 1990. In 1994, Mayor Whelan was a candidate for re-election as Mayor. (App. 4a-5a) In February 1994, Petitioner announced his candidacy for the office of Mayor of Atlantic City. (*Id.*) Petitioner was a minor fringe candidate under the Natural Law Party.

During the campaign, Petitioner alleged that he revealed a number of improprieties and irregularities associated with Whelan's administration. (*Id.*) On May 12, 1994, Petitioner was defeated by Mayor Whelan. (*Id.*) The Petitioner received less than two-hundred votes. (*Id.*)

Subsequently, by letter dated October 14, 1994, the NJDOP advised all local appointing authorities about the amendment to N.J.A.C. 4A:4-4.8, which required a statement of reasons why an appointee was selected over another eligible in the case of a tie. (App. 6a-7a) Pursuant to the amendment to the regulation, Executive Order No. 3 was promulgated. (*Id.*) The Order provided the following considerations in deciding whom to promote:

1) Disciplinary History

2) Education

3) Sick Leave Abuse

4) Diversity

5) Residency

6) Raw Score

Following the adoption of Executive Order No. 3, co-defendant Brenner recommended Mooney and Tamburilla for promotion. (*Id.*) Brenner has been Fire Chief in Atlantic City since May 1991. Brenner's role in promotions is to make recommendations to the Mayor concerning whom to promote. The Mayor has followed Brenner's recommendation in every case. Whelan never told Brenner that he wanted a particular person promoted.

Whelan, consistent with his normal practice, accepted Brenner's recommendation and promoted Tamburilla and Mooney to the position of Battalion Fire Chief in December 1994. (App. 8a)

Prior to instituting the district court action, Petitioner filed appeals with the New Jersey Public Employment Relations Commission ("NJPERC) and NJDOP alleging that he was not promoted to Battalion Chief in retaliation for his Mayoral campaign against Mayor Whelan. Both agencies found no basis to challenge the Petitioner's non-selection.

On May 9, 1996, the Petitioner filed an action in the District Court of New Jersey. He amended his complaint on

June 12, 1996 (*Id.*). The complaint alleges that Petitioner is the victim of a conspiracy by Respondent Whelan, and the other defendants, to deprive him of a promotion because of his campaign for Mayor in 1994.

Respondent Whelan, and the other defendants, filed Motions to Dismiss pursuant to the Entire Controversy Doctrine and Rule 12(b)(6). (App. 32a) On May 6, 1997, the District Court denied the motions to dismiss under the entire controversy doctrine. (*Id.*) The District Court, however, dismissed the defamation and the NJLAD claim. (*Id.*)

After extensive discovery, Respondent Whelan, and the other defendants, filed Motions for Summary Judgment. On March 5, 1998, the District Court granted the motions and dismissed the remaining counts of Petitioner's complaint. (App. 2a)

On or about March 17, 1998, Petitioner filed a Motion for Relief from Judgment under Fed. R. Civ. P. 60(b)(1) to open up the Judgment for consideration of three unsigned, unsworn statements submitted below. On April 8, 1998, the District Court denied Petitioner's Motion for Relief.

On or about May 8, 1998, the plaintiff filed an appeal with the United States District Court of Appeals for the Third Circuit appealing the District Court's grant of summary judgment and denial of his Motion for relief under Fed. R. Civ. P. 60(b). On June 8, 1999, the Court of Appeals affirmed the District Court's decision. (App. 1a)

Plaintiff subsequently filed a Petition for Rehearing and Rehearing En Banc on or about June 21, 1999, which was denied by the Court of Appeals on July 8, 1999. (App. 52a)

REASONS FOR DENYING THE WRIT

THE LOWER COURT CORRECTLY APPLIED WELL SETTLED LAW AND PROPERLY GRANTED SUMMARY JUDGMENT AS PLAINTIFF DID NOT PROVIDE SUFFICIENT EVIDENCE TO ESTABLISH THAT THERE WAS A GENUINE ISSUE OF MATERIAL FACT THUS THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

A. Standard of Review

Rule 10 of the Rules of the Supreme Court of the United States provide the standard governing review on certiorari. Rule 10 provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a

> departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

In this case, the petition does not fall under any of the reasons set forth in Rule 10. Nor does the Petitioner provide any other compelling reasons as to why his petition should be granted. The decision of the District Court to grant Summary Judgment to Respondent Whelan was a correct application of settled law.

B. The District Court properly applied well established law in determining that Petitioner did not provide sufficient evidence of a violation of his Freedom of Speech to defeat a Summary Judgment Motion and therefore a review by this Court is not required.

At the outset, I object to the Petitioner's claim that there was only limited discovery in this case. In fact, there was extensive discovery, which included at least nine (9) depositions. However, Petitioner never presented any evidence that would lead a reasonable jury to find in his favor. I also object to his claim that he was first on the list. In reality, he was in a three-way tie with two other firefighters.

Turning to the substance of the petition, the lower court properly addressed the legal standards in granting Summary Judgment to Respondent Whelan. The lower court looked to Fed. R. Civ. P. 56(c) and case law for the standard for summary judgment. The Court also looked to *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977) to determine if Petitioner has shown that his alleged constitutionally protected activity was the substantial and motivating factor for his nonselection for battalion chief. (App 8a-9a, 12a)

The standard for a summary judgment motion in federal court is set forth in Rule 56 of the Federal Rules of Civil Procedure. Rule 56(c) provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the

moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c).

A fact is material if it might affect the outcome of the suit under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In addition, a dispute over a material fact must be genuine, i.e., the evidence must be such "that a reasonable jury could return a verdict in favor of the non-moving party." *Id.*

In a summary judgment motion, the Court must construe all reasonable inferences in a light most favorable to the non-movant. *Pollock v. American Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3d Cir. 1986). The moving party has the initial burden to identify evidence that it believes shows an absence of a genuine issue of material fact. *Celotex Corp. v. Citrate*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Where the non-moving party will bear the burden of proof at trial, the moving party's burden can be discharged by "showing — that is, pointing out to the district court — that there is an absence of evidence to support the non-moving party's case." *Id.* at 325. If the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party to "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The non-moving party may not rely merely upon bare assertions, conclusory allegations or suspicions. *Fireman's Ins. Co. of Newark v. DuFresne*, 676 F.2d 965, 969 (3rd Cir. 1982). To defeat the motion for summary judgment, the non-moving party must offer specific facts contradicting those set forth by the movant, thereby showing that there is a genuine issue

for trial. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990). Inferences "based on speculation or conjecture [do] not create a material factual dispute sufficient to defeat entry of summary judgment." *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 383, n.12 (3d Cir. 1990).

The Petitioner has not claimed that the lower court did not apply the correct standard for Summary Judgment. Nor does he argue that the decision was in conflict with other circuits or this Court's decisions. He is essentially claiming that the lower court misapplied the law to the facts. That is not the case. Further, pursuant to Rule 10, certiorari is rarely granted on those grounds and should not be granted in this case.

In *Mt. Healthy*, *supra*, this Court addressed the legal standard applicable in retaliation cases in violation of free speech under the First Amendment. This Court found that the initial burden is on the complainant to show that their conduct was constitutionally protected and that such conduct was the "substantial" or "motivating" factor for the alleged adverse action. 429 U.S. at 287 If the complainant carries that burden, then the burden shifts to the employer to show by a "preponderance of the evidence" that they would have taken the same action despite the constitutionally protected activity. *Id.*

The lower court properly and correctly applied standard set forth in *Mt. Healthy*, *supra*, to this case. Although citing a different case, this is the very test that Petitioner states should have been utilized in his brief at page 9.

In this case, Petitioner claims that Executive Order #3, which set forth six (6) criteria to be considered when breaking a tie, was promulgated solely to prevent his promotion. However, he could not point to any material facts or evidence to support that contention. Petitioner claims were conclusory and based on speculation and conjecture only. Such speculation and conjecture cannot overcome a motion for summary judgment. To the contrary, the Respondent provided evidenced that the policy was promulgated pursuant to the revision to NJDOP's N.J.S.A 4A:4-4.8, which now require a statement of reasons for promotions.

Contrary to Petitioner's claim in his brief, there was no admissible evidence proffered by Petitioner to demonstrate any alleged remarks made by the Mayor or any other officials during or after the hiring process. The Petitioner submitted three (3) unsigned, unsworn statements in violation of Fed. R. Civ. P. 56(e), which were correctly not considered by the lower court.

The lower court also correctly stated that the Petitioner, in his brief in opposition to Summary Judgment, failed to address the issue of whether his conduct was constitutionally protected, which is contrary to the *Mt. Healthy* standard and the standard set forth in Petitioner's brief. (App. 11a) Nevertheless, the lower court applying the proper standard found that political campaigning is protected speech under the First Amendment, but that Petitioned did not proffer sufficient evidence to support his claim that his political campaign against Mayor Whelan was the substantial and motivating factor in his not being promoted to Battalion Chief.

It is evident that the lower court correctly applied the standard for summary judgment and the governing

substantive law in rendering the decision in this case. Thus, a review by this Court is not warranted.

C. The lower court never opined that Political Discrimination should or should not have a different standard of proofs than other employment discrimination cases.

The case at hand involved a claim of retaliation based on a violation of a constitutionally protected activity, i.e. Freedom of Speech. The District Court properly stated that the "substantive law governing the dispute will determine which facts are material, and only disputes over those facts, 'that might affect the outcome of the suit under the governing law will properly preclude entry of summary judgment.' " *Anderson*, *supra*, 477 U.S. at 248 (App. at 9a) The district court applied the governing law set forth in *Mt. Heathy*, *supra*, which discussed retaliation in violation of free speech.

Petitioner is apparently attempting to make a comparison between the standards set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which dealt with Title VII of the Civil Rights Act of 1964, and *Mt. Healthy*, *supra*. However, in both cases the standards are similar, with the initial burden being placed on the complainant to show protected status or activity and adverse action being taken because of that status or activity. Then the burden shifts to the employer to show a legitimate reason for the action taken.

In any event, the lower court in reviewing the record correctly applied the proper standard and found that the Petitioner did not carry his burden by providing sufficient evidence to defeat the motion for summary judgment. Contrary to Petitioner claim, the lower court plainly and

clearly knew how to weigh the evidence in this case. Petitioner simply did not submit any evidence that established any material facts. Thus, the review of this issue is not warranted by this Court as the correct standards were applied.

CONCLUSION

Based on the foregoing, the Petition for a Writ of Certiorari should be denied as the lower court properly applied settled law, which is not in conflict with any other circuits or with relevant decisions of this Court. Thus, revisiting this issue is not warranted by the Court.

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No. 99-651

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IN THE

Supreme Court of the United States

KIM D. FIORIGLIO,

Petitioner,

v.

CITY OF ATLANTIC CITY, JAMES WHELAN, PAUL GALLAGHER, BENJAMIN BRENNER, TERRENCE MOONEY, DENNIS BROOKS, ATLANTIC CITY FIREFIGHTERS LOCAL 198, JOSEPH RUSH, JOHN DOE(S) 1-50, fictitious names(s) as individuals, and ABC CORPORATION(S) 1-50, fictitious names(s) as corporations and/or entities, i/j/s/a,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CITY OF ATLANTIC CITY

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QUESTION PRESENTED FOR REVIEW

Whether the Third Circuit Court of Appeals was incorrect as a matter of law in affirming the lower court's determination that the evidence submitted by the Petitioner did not support his claims of political discrimination under 42 U.S.C. § 1983?

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OPINIONS BELOW

In addition to the Opinions and Orders listed in the petition (Pet. 1), the Opinions of the United States District Court for the District of New Jersey dated April 8, 1998, denying Petitioner's Motion for Relief from Judgment under Rule 60(b) of the Federal Rules of Civil Procedure, and dated August 13, 1998, denying Petitioner's Motion to expand the record for purposes of appeal pursuant to Rule 10(e) of the Federal Rules of Civil Procedure, are unreported. In addition, by Order dated June 2, 1999 the United States Court of Appeals for the Third Circuit denied the Petitioner's Motion to expand the record.

STATEMENT OF JURISDICTION

Respondent, City of Atlantic City ("City"), does not contest the Court's jurisdiction pursuant to 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Petitioner's meritless assertions that the standard for the burden of proof in a First Amendment political discrimination claim needs to be clarified provides no cause for this Court's review. Nowhere in the record has there been any statement by the District Court or the Third Circuit that these lower courts were unsure how to weigh evidence in political discrimination cases verses other employment discrimination cases. In addition, the petition does not cite to any authority that expresses any reservation or concern regarding the applicable burden of proof standard in First Amendment political discrimination matters. This contrived "uncertainty" asserted by the Petitioner does not provide any compelling reason to grant the petition.

A. The petition contains misstatements and misrepresents the determinations made by the District Court.

The Petitioner grossly distorts the record below and makes baseless assertions without appropriate citation to the record.

Initially, the Petitioner asserts that during the 1994 campaign for Mayor, the Petitioner revealed damaging facts regarding the Mayor. (Pet. 3). While the Petitioner may have made comments about the Mayor during the campaign, there was no evidence presented to the lower courts evidencing that the Petitioner revealed damaging facts regarding the Mayor. The Petitioner also inaccurately states that there was limited discovery allowed against "the city officials". (Pet. 5). There is no indication in the record below that discovery was in anyway limited. It was not until after the Petitioner's complaint had been dismissed by the District Court, and the Petitioner's Motion for Relief under Fed. R. Civ. P. 60(b) was denied by the District Court, that Petitioner filed a Motion to expand the record on appeal with the District Court. That Motion was denied by the District Court and that denial was affirmed by the Third Circuit. The Petitioner has improperly insinuated that in someway his case was prejudiced insofar as he was afforded "limited discovery." This is a baseless assertion and a statement that finds no support in the record, which is apparent by the Petitioner's lack of any citation.

Petitioner also inaccurately and without any citation asserts that he had "demonstrated the continuous comments the city officials made against him and how they changed local rules in order to prevent him from being promoted to fire battalion chief." (Pet. 5). The Petitioner fails to identify

what comments were made by what city officials. In addition, the Petitioner also fails to indicate that three unsworn and unsigned taped statements that the Petitioner submitted in opposition to the summary judgment motions below, failed to meet the requirements of Fed. R. Civ. P. 56(e) and were not considered by the lower courts in conjunction with the summary judgment motions.[1]

B. The record does not support a conclusion that politics caused others to be promoted over the Petitioner.

Petitioner's disingenuous assertion that city officials "changed local rules in order to prevent him from being promoted to fire battalion chief" (Pet. 5) ignores the following findings in the District Court's March 5, 1998 decision:

> Furthermore, plaintiff admits that the newly adopted promotion criteria, disciplinary history, education, sick leave, residency and raw score, are appropriate considerations in deciding whom to promote. He then acknowledges that he would not rank highly on some of these admittedly appropriate criteria. He admits that he has had disciplinary problems in the past. He also does not dispute that the other two candidates who were being considered for promotion have better educational backgrounds than he does. (Pet. App. 23a).

* * *

---

1. Footnote #2 of the District Court's April 8, 1998 Opinion denying Petitioner's motion for relief from judgment under Fed. R. Civ. P. 60(b) stated that even if the court were to consider the statements, the court would still conclude that Petitioner's evidence could not support his claim under 42 U.S.C. § 1983.

> Plaintiff simply cannot maintain a claim of civil conspiracy in violation of sec. 1983 on the unsubstantiated theory that defendants conspired against him in the process of formulating the new promotional criteria. He has presented this Court with no proof of improper conduct by the defendants upon which a jury could base a finding in his favor. The Mayor adopted rational promotion criteria, pursuant to N.J.A.C. 4A:4-4.8.5, which in no manner discriminated against plaintiff or biased him in the promotional decision-making process. (Pet. App. 24a).

The findings by the District Court also provide a basis to dismiss the Petitioner's assertion that "he was the most qualified for the position" and that the "mayor changed the hiring process just so that he did not have to promote the Petitioner, and, in fact, hired two other people who did not score as high as the Petitioner." (Pet. 6). In addition, these excerpts also evidence how incorrect and disingenuous the Petitioner's assertion is that the "mayor and the city officials refrained from making any hiring decisions until they could change the law just because of the Petitioner's political beliefs — that is, political discrimination and infringement upon First Amendment rights (freedom of speech)." (Pet. 6).[2]

---

2. Oddly, it was the District Court, and not the Petitioner, that formed the Petitioner's section 1983 claim as being based upon the premise that Petitioner's First Amendment rights were violated when defendants conspired to retaliate against him for his mayoral campaign against Mayor Whelan. The court noted that to make out a section 1983 conspiracy claim, the plaintiff must make specific factual allegations of a combination, agreement, or understanding among all or between any of the defendants to plot, plan, or conspire to carry out the alleged chain of events in order to deprive plaintiff of a federally protected right. Significantly, the District Court noted that the plaintiff's brief completely failed to address this issue. (March 5, 1998 District Court Opinion, Pet. App. 11a).

The Petitioner simply disagrees with the factual findings of the courts below. Specifically, the District Court determined in its March 5, 1998 Opinion that:

> . . . plaintiff has failed to show that the adverse employment action he suffered was causally connected to his campaign comments. Plaintiff has produced no evidence to support his theory that his failure to be promoted was causally connected to his failed mayoral campaign. Without any evidence from which a jury could infer that he was not promoted because of his mayoral campaign . . . Plaintiff simply cannot survive summary judgment. (Pet. App. 28a).

These factual findings and application of the law by the lower courts does not provide the compelling reasons necessary to grant the petition. The Petitioner seems to have created an entirely new factual background for the case, and has ignored the actual facts disclosed in discovery and the determinations by the lower courts. For the same reasons, the Petitioner's assertion that he submitted evidence of "political discrimination from the onset" (Pet. 8) is also disingenuous, lacks factual support in the record and should be disregarded.

REASONS FOR DENYING THE WRIT

The petition's claim that the courts below abused their discretion in determining that the evidence submitted by the Petitioner did not support his claims of political discrimination under 42 U.S.C. § 1983 is not compelling and does not warrant review by this Court.

A. The burden of proof standard for First Amendment political discrimination claims is clear and settled.

The decision below was a plainly correct application of settled law and there has been no indication by the District Court, the Third Circuit or any other authority cited by the Petitioner, that the burden of proof standard associated with First Amendment political discrimination claims needs to be clarified. To make out a claim of discrimination based on political association, a public employee must prove: (1) that the employee works for a public agency in a position that does not require a political affiliation, (2) that the employee maintained an affiliation with a political party, and (3) that the employee's political affiliation was a substantial or motivating factor in the adverse employment decision. If the employee demonstrates these elements, the employer may avoid a finding of liability by demonstrating by a preponderance of the evidence that it would have made the same decision even in the absence of the protected affiliation. *Robertson v. Fiore*, 62 F.3d 596, 599 (3d Cir. 1995), *citing authority*, including *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 287, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977). The Petitioner has not placed before this Court any statements or findings by any courts indicating that there is uncertainty in weighing evidence, or in the application of burden-shifting mechanisms, in First Amendment political

discrimination cases. Frankly and plainly, the Petitioner does not like the applicable burden-shifting mechanism and wants a different one to apply in the hope that in someway his claim will survive. However, the Petitioner's argument has no basis in law, is not compelling and does not warrant review by this Court.

B. The *McDonnell-Douglas* pretext framework is inadequate with respect to First Amendment political discrimination claims.

The Petitioner has asserted that the burden of proof standard associated with political discrimination claims is "different from the *McDonnell-Douglas* discrimination test and also makes it easier for the defendant to escape liability." (Pet. 7). However, the *McDonnell-Douglas* pretext framework is inadequate when applied to the Petitioner's claim of political discrimination. Initially, the first element of four that a complainant in a Title VII matter must show to establish a prima facie case is that he or she belongs to a racial minority. Incorrectly, the Petitioner argues that he is able to prove this element of his prima facie case because he "was in the minority of not supporting the mayor for reelection." (Pet. 6). In addition, the fourth element that must be established for a prima facie case under the *McDonnell-Douglas* pretext framework requires the complainant to prove that after he was rejected, the position he was seeking remained open and the employer continued to seek applicants from persons of the complainants' qualifications. This also is inapplicable to the facts in this matter, which evidence that two other individuals on the promotion list with the Petitioner were eventually promoted to battalion chief (March 5, 1998 District Court Opinion, Pet. App. 8a).

A political discrimination case employs similar, though not identical, burden-shifting mechanisms as those used in other employment discrimination contexts, such as Title VII cases. *Stephens v. Kerrigan*, 122 F.3d 171, 176 (3d Cir. 1997). Under Title VII, a plaintiff must establish a prima facie case of employment discrimination, at which point a presumption of discrimination attaches to the plaintiff's claim. A limited burden of production then passes to the employer to articulate a legitimate, nondiscriminatory reason for its actions, a burden which is fully satisfied if the employer submits enough evidence to raise a genuine issue of material fact. The employer need not submit sufficient evidence to "persuade the [fact finder]." *Acevedo-Diaz v. Aponte*, 1 F.3d 62, 67 (3d Cir. 1993), *citing authority*. Notwithstanding the interim shift in the burden of production to the employer, the plaintiff-employee in a Title VII case "retains the burden of persuasion" at all times. *Id.*

By contrast, under the *Mt. Healthy* burden-shifting mechanism applicable to a First Amendment political discrimination claim, the burden of persuasion itself passes to the defendant-employer once the Plaintiff produces sufficient evidence from which the fact finder reasonably can infer that the Plaintiff's protected conduct was a "substantial" or "motivating" factor behind his dismissal or adverse employment action. Once the burden of persuasion shifts to the defendant-employer, the plaintiff-employee will prevail unless the fact finder concludes that the Defendant has produced enough evidence to establish (by a preponderance) that the plaintiff's dismissal would have occurred in any event for nondiscriminatory reasons. *Acevedo-Diaz v. Aponte*, at 67.

The Petitioner incorrectly argues that "this shift of burden of proof [in political discrimination cases] is different from the *McDonnell-Douglas* discrimination test and also makes it easier for the defendant to escape liability." (Pet. 7). The Petitioner ignores that under Title VII the employer has only a limited burden of production to articulate a legitimate, nondiscriminatory reason for its actions. By contrast, under the burden-shifting mechanisms applicable to a First Amendment political discrimination claim, once the burden of persuasion shifts to the defendant-employer, the plaintiff-employee will prevail unless the fact finder concludes that the defendant-employer has proved by a preponderance of the evidence that the plaintiff's dismissal would have occurred in any event for nondiscriminatory reasons. This is a much more difficult burden for the defendant-employer.

The Petitioner also ignores that under Title VII, upon an employer articulating a legitimate and nondiscriminatory reason for its actions, a burden which is fully satisfied if the employer submits enough evidence to raise a genuine issue of material fact, the presumption of discrimination drops and the plaintiff must then offer evidence tending to show that the defendant's explanation is a pretext for discrimination. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802-804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). As articulated in *Acevedo-Diaz v. Aponte*, at 67, the plaintiff-employee in a Title VII case "retains the burden of persuasion" at all times, and, by contrast, the burden of persuasion in a First Amendment political discrimination claim passes to the defendant employer once the plaintiff produces sufficient evidence. Clearly, it is more difficult for a plaintiff to prove liability in a Title VII case, with the *McDonnell-Douglas* burden-shifting mechanism, than in a First Amendment political discrimination case.

The Petitioner also argues that this Court "must extend and compare the age discrimination analysis to political discrimination." (Pet. 8). However, the framework to establish discrimination under the Age Discrimination in Employment Act, 29 U.S.C.A. §§ 621-624 (West 1985 and Supp. 1994) is inadequate when applied to the Petitioner's allegations in this matter. *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777-78 (3d Cir. 1994).

CONCLUSION

For the reasons given above, and to avoid repetition, for those reasons given in Respondent's James Whelan's, Paul Gallagher's and Benjamin Brenner's Briefs in opposition in this matter, the petition should be denied.

Respectfully submitted,

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No. 99-651

IN THE

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KIM D. FIORIGLIO,

Petitioner,

v.

CITY OF ATLANTIC CITY, JAMES WHELAN, PAUL GALLAGHER, BENJAMIN BRENNER, TERRENCE MOONEY, DENNIS BROOKS, ATLANTIC CITY FIREFIGHTERS LOCAL 198, JOSEPH RUSH, JOHN DOE(S) 1-50, fictitious names(s) as individuals, and ABC CORPORATION(S) 1-50, fictitious names(s) as corporations and/or entities, i/j/s/a,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT PAUL GALLAGHER

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STATEMENT OF THE CASE

Petitioner seeks review of the Third Circuit's opinion affirming the District Court of New Jersey's May 6, 1997 Decision granting Summary Judgment to Defendants dismissing Counts II and V, alleging causes of action for Defamation and Violation of the New Jersey Law Against Discrimination (NJLAD) and the District Court of New Jersey's March 5, 1998 Decision granting Summary Judgment to Respondents and dismissing all of Plaintiff's remaining claims, Count I, Conspiracy to Deprive Plaintiff of Promotion/Political Retaliation, Count III, Tortious Interference with Plaintiff's Business Activities, Count IV, Violation of Plaintiff's Right to Free Speech and Expression and Count VI, Violation of Conscientious Employee Protection Act.

As detailed below, there is no cause for this Court's review, as the District Court has clearly stated the standard of proof used in concluding Petitioner failed to make specific allegation of a conspiracy and was not deprived of his First Amendment Rights. This Petition is merely a challenge to the District Court's factual findings, as affirmed by the Third Circuit, that Petitioner had no admissible evidence to suggest political retaliation.

The Petitioner, Kim D. Fioriglio, is employed as a Fire Captain in the Atlantic City Fire Department. On November 20, 1992, the New Jersey Department of Personnel (NJDOP) posted the results of its civil service examination for the position of Battalion Fire Chief. These results ranked Petitioner in a four way tie with Daniel Tamburella, and former co-defendants Dennis Brooks and Terrence Mooney. On April 26, 1993 due to his veteran status preference,

co-defendant Dennis Brooks was promoted to Battalion Chief, leaving a three way tie among Petitioner and the former Defendants Mooney and Tamburrella.

In March 1994, Petitioner publicly announced his candidacy for the office of Mayor of Atlantic City. Thereafter, Mayor James Whelan was re-elected to a second term as Mayor of Atlantic City on May 12, 1994. Mayor Whelan received over 5,000 (five thousand) votes and Petitioner received under 200 (two hundred) votes.

On or about October 14, 1994, the NJDOP sent out an advisory letter alerting all Appointing Authorities of the existence of new guidelines, in the form of revised N.J.A.C. 4A:4-4.8(b), regulating the promotional tie breaking procedures within civil service communities. Adopted on September, 7, 1994, revised N.J.A.C. 4A:4-4.8(b)(4), required that an objective statement of reasons for promotion of a particular candidate be prepared and filed with the NJDOP. N.J.A.C. 4A:4-4.8(b)(4) did not set forth any specific criteria to be used in the promotion process, leaving those issues to the discretion of the Appointing Authority. In the City of Atlantic City, the Appointing Authority is the Mayor, James Whelan.

Prior to the adoption of revised N.J.A.C. 4A:4-4.8, the civil service promotional tie-breaking procedure utilized in Atlantic City first considered city residency and second, raw score as a basis for breaking ties for civil service promotions.

The within Respondent, Paul J. Gallagher, was employed by the City of Atlantic City as the City Solicitor from December of 1990 through April of 1995. In that capacity, the October 14, 1994, Civil Service Advisory was brought

to the attention of Respondent Gallagher, who was then obligated to advise the Appointing Authority of this change in the law and its manner of compliance. In response to the amendment to N.J.A.C. 4A:4-4.8(b), and the necessity to clarify the new promotional guidelines, Respondent Gallagher, in his capacity as City Solicitor, drafted Executive Order Number 3 of 1994 after receiving direction as to its contents from the Mayor. Executive Order No. 3 was executed by Mayor Whelan and filed with the Atlantic City City Clerk on December 5, 1994. The new criteria cited in Executive Order No. 3 arose out of policy decisions made by the Mayor and Department Chief, Respondent Benjamin Brenner, regarding the use or non-use of residency, as opposed to other considerations as the tie-breaking determinant. Ultimately the tie-breaking determinants, without regard to hierarchy, were established to be:

1) Disciplinary history;

2) Education;

3) Sick leave abuse;

4) Diversity;

5) Residency; and

6) Raw Score

Following the adoption of Executive Order No. 3, former co-defendants Mooney and Tamburella were promoted to the position of Battalion Chief, which promotions were made pursuant to the profiles of Executive Order No. 3 and N.J.A.C. 4A:4-4.8. In further compliance with N.J.A.C.

4A:4-4.8(b)(4), by letter to the NJDOP dated December 19, 1994, Respondent Chief Brenner articulated the reasons for former co-defendant Mooney's and Tamburella's appointments to Battalion Chief. Respondent Gallagher played no role in the promotion process, the selection of Mooney and Tamburella for promotion or the drafting of Respondent Chief Brenner's letter of December 19, 1994 to the NJDOP.

On May 9, 1996, Petitioner filed the within action in the United States District Court for the District of New Jersey alleging that Respondents conspired against him and denied him a promotion to Battalion Chief in retaliation for his mayoral campaign against Mayor Whelan.

On May 6, 1997 the District Court granted partial Summary Judgment to Respondents and on March 5, 1998 the District Court granted Summary Judgment dismissing all of Petitioner's remaining claims. On April 4, 1998 the District Court denied Petitioner's Motion for Relief under Rule 60(b). On June 8, 1999, the Third Circuit affirmed the District Court's Decisions without opinion. The Petitioner filed a Petition for Rehearing *en banc* to the Third Circuit, which was denied by Order dated July 8, 1999.

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THERE WERE NO FACTS TO SUGGEST ANY FIRST AMENDMENT VIOLATION.

A. Summary Judgment Was Properly Granted Because There Was No Genuine Issue of Material Fact and Defendants Were Entitled to Judgment as a Matter of Law.

Appellate review of a district court's decision to grant summary judgment is plenary. *Johnson v. Horn*, 150 F.3d 276, 281 (3d Cir. 1998) (citing *Sabo v. Metropolitan Life Ins. Co.*, 137 F.3d 185, 195 (3d Cir. 1998)). The Third Circuit was bound to apply the same summary judgment test as applied by the District Court. *Trap Rock Industries, Inc. v. Local 825, Int'l Union of Operating Eng'rs, AFL-CIO*, 982 F.2d 884 (3d Cir. 1992), citing *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir.), *cert. dismissed*, 483 U.S. 1052 (1987). Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, the district court must grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Desvi, Inc. v. Continental Ins. Co.*, 968 F.2d 307, 308 (3d Cir. 1992). Rule 56(c) of the Federal Rules of Civil Procedure directs that summary judgment shall be granted:

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

> genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The Supreme Court has held that "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986), this Court has further opined:

> [A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial . . . [T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

Id. at 247-250. This standard is further clarified in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986), wherein the Supreme Court held:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential

> element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of [his] case with respect to which [he] has the burden of proof.

In the instant case, Petitioner's unsubstantiated speculation was insufficient evidence to defeat Respondents' motions for summary judgment. In support of his claims, Petitioner continues to rely on the unsworn, unsigned certifications and other inadmissable evidence. Although this Petition refers to how "the Petitioner demonstrated the continuous comments the City officials made against him and how they changed local rules in order to prevent him from being promoted to Fire Battalion Chief," and "evidence to demonstrate remarks the Mayor and other city officials made during the hiring process," no such evidence exists. (Pet. 5-6). Petitioner continues to rely on the unsworn statements despite the District Court's March 5, 1998 decision that these statements fail to meet the requirements of Fed. R. Civ. P. 56(e) and the court would not consider these statements, the District Court's April 8, 1998 decision that these statements did not warrant relief under Rule 60(b), and the District Court's August 13, 1998 decision to deny expansion of the record to include these statements. Time and time again, the District Court referred to Petitioner's lack of evidence:

> . . . plaintiff admits he has no personal knowledge about what the defendants talked during the

> alleged meeting at which Executive Order Number 3 was formulated. He has absolutely no evidence suggesting that defendants set out to retaliate against him for exercising his First Amendment rights. Nor can he point to any other evidence which demonstrates that defendants intentionally created new criteria that would adversely affect his changes of being promoted. (Pet. 15a)

As to Respondent Gallagher, the District Court held:

> Gallagher's actions in carrying out his duties as City Solicitor by drafting a policy at the direction of the Mayor, in compliance with N.J.A.C. 4A:4-4.8, cannot constitute a violation of §1983 without any evidence that the drafting was done with the purpose of retaliating against plaintiff.
>
> Plaintiff also is unable to point to any evidence suggesting that he was treated in a negative manner by any of the defendants either during or after this campaign. In fact, as to defendant Gallagher, he admits that he does not know him personally and would not know him if plaintiff were to see him. (Pet. 21a)

The within Petition essentially challenges the lower court's factual finding, as the District Court made it very clear that the Petitioner did not meet his burden of proof:

> Plaintiff simply cannot maintain a claim of civil conspiracy in violation of §1983 on the unsubstantiated theory that defendants conspired against him in the process of formulating the new

> promotional criteria. He has presented this Court with no proof of improper conduct by the Defendants upon which a jury could base a finding in his favor . . . plaintiff also has not shown how Gallagher's role in bringing the City into compliance with N.J.A.C. 4A:4-4.8 violates his First Amendment rights. (Pet. 24a)

The District Court further held:

> . . . plaintiff has no evidence that any action was taken against him as a result of his protected speech. Plaintiff has nothing but speculation and conjecture linking his speech during the campaign to his failure to be promoted and therefore his state constitutional claim, like his §1983 claim must fail. (Pet. 25a)

B. Petitioner Has No Evidence to Support His Claim of Conspiracy.

Petitioner has alleged a conspiracy in violation of 42 U.S.C. § 1983, specifically that Respondents conspired to deprive him of his First Amendment right to freedom of speech. 42 U.S.C. § 1983 provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

> Constitution and Laws, shall be liable to the party injured in an action at law, suit and equity, or other proper proceeding for redress.

To prove a claim under § 1983, Petitioner must allege conduct which deprives him of a right or privilege secured by the Constitution or laws of the United States. *Freedman v. City of Allentown, PA*, 853 F.2d 1111, 1114 (3d Cir. 1988). *See Riley v. Jeffes*, 777 F.2d 143, 145 (3d Cir. 1985). To prove a § 1983 conspiracy, Petitioner must show that two or more of the Respondents reached an agreement to deprive him of a constitutional right "under color of law." *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 699-700 (3d Cir. 1993) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970). Petitioner must demonstrate the possibility that certain facts exist in which a jury could "infer from the circumstances" that the defendants had a "meeting of the minds" and "reached an understanding" to further the conspiracy. *Adickes* at 158. Evidence that the Respondents "met and otherwise communicated on several occasions" wherein "nothing suspicious or improper in such meetings, which are routine and necessary," without more, does not support a conspiracy theory. *Scotto v. Almenas*, 143 F.3d 105, 114-115 (2d Cir. May 5, 1998) (citing *San Fillippo v. U.S. Trustco*, 737 F.2d 246, 256 (2d Cir. 1984). The mere allegation that such a meeting occurred will not be sufficient "to create a material issue of fact as to whether something improper took place during them." *Scotto* at 115. Where, as in Petitioner's case, the Petitioner only alleges that conspiracy occurred based on the Petitioner's "information and belief," the Respondents are entitled to summary judgment as a matter of law. *Leon v. Murphy*, 988 F.2d 303, 310 (2d Cir. 1993).

Similar to the case of *Stephens v. Kerrigan*, 122 F.3d 171, 173 (3d Cir. 1997), where plaintiff police officers sued the city, mayor and president of the fraternal order of police, claiming they were denied promotions for openly opposing or failing to support the mayor's candidacy, this Court must again focus on "whether [plaintiff] adduced sufficient evidence to permit the fact finder to draw the inference that the employment action was motivated by an impermissible consideration." In *Stephens*, plaintiff Stephens declined to endorse the mayor and testified that he was a vocal supporter of the mayor's opponent within the police department and among neighbors and friends. *Id.* at 173. In a more compelling fact pattern for the plaintiffs than in the instant case, plaintiff Stephens was already Police Chief and ranked first for investigative lieutenant and first for patrol lieutenant at the time when, immediately following the election, defendant Mayor Heydt informed Stephens he would not be rehired as Police Chief. *Id.* at 174. Somewhat similar to the facts of the instant case regarding the October 14, 1994 Alert Letter from the NJDOP, defendant Heydt argued that the failure to promote the defendants was primarily due to the fact that an unfair labor practice complaint before the Pennsylvania Labor Relations Board had been filed as to the very promotion list Plaintiff Stephens sought to enforce. *Id.* at 180. In affirming the district court's grant of summary judgment as to certain plaintiffs, the Third Circuit held

> Even if [the mayor's] reluctance to promote was colored by his view that [plaintiffs] had been in an opposite political camp during the election, we believe that a reasonable jury could not have attributed their lack of promotion to that basis -

> when the [promotions] lists, which had been under attack, were thereafter invalidated.

Id.

Although the promotion list in this case was never invalidated, Defendants Mayor Whelan and Brenner had to consider the directive from the State when considering promotions. Unlike the *Stephens* situation where no one was promoted, the two other candidates tied for first place were promoted and the reasons for their promotion were detailed in compliance with N.J.A.C. 4A:4-4.8(b)(4) by Respondent Brenner. Executive Order Number 3 was drafted in reaction to the State Department of Personnel's revision of N.J.A.C. 4A:4-4.8(b)(4), in an effort to comply with state regulations and not in any way related to Petitioner or his inconsequential mayoral candidacy. There is no direct nor circumstantial evidence that the Respondents had any agreement or "meeting of the minds" to commit any unlawful act, and hence no evidence that would suggest any conspiracy occurred. *Adickes* at 158.

Petitioner has failed to raise any issue of material fact linking Respondent Gallagher's drafting of Executive Order Number 3 of 1994 to retaliation for Petitioner's mayoral campaign in which Petitioner received less than 200 votes.

After three years of litigation, Petitioner failed to establish how his less than 200 votes, in comparison to Mayor Whelan's 5,000 votes rendered him a possible spoiler. If anything, those numbers only reinforce the position Respondents have consistently maintained throughout this case, namely that Kim Fioriglio's candidacy did not affect the 1994 mayoral election nor the subsequent promotions of highly qualified firefighters Mooney and Tamburella.

Petitioner has failed to raise any issue suggesting Respondent Gallagher was involved in any type of conspiracy. With only "unsubstantiated speculation" to support his conspiracy theory, summary judgment was clearly warranted. *See Scotto* at 115. There are no facts to suggest that the Respondents were acting in concert to deprive Petitioner of any constitutional or federally protected right. The facts that do exist suggest the City needed to comply with and respond to a newly enacted state regulation. Respondent Gallagher's activity was limited to ensuring the City's compliance with that regulation and that activity had nothing to do with Kim Fioriglio.

C. Summary Judgment Was Proper Because There Was No Evidence of a Violation of Freedom of Speech.

Petitioner has alleged that Respondents violated his rights to free speech and expression. Under New Jersey Law, in order to succeed on this claim, Petitioner must show that he engaged in protected speech and that speech was a substantial motivating factor in an adverse employment decision. *See Connick v. Myers*, 461 U.S. 139, 142 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). Petitioner has no evidence that any action was taken against him as a result of his protected speech. As the District Court found that Petitioner has nothing but speculation and conjecture linking his campaign speech to his failure to be promoted, the District Court properly granted Summary Judgment on Respondents' Motions for Summary Judgment as to Petitioner's state constitutional claim.

II.

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THERE WERE NO FACTS TO SUGGEST ANY POLITICAL DISCRIMINATION AND PETITIONER COULD NOT MEET HIS BURDEN OF PROOF.

A. Petitioner Could Not Meet his Burden of Proof.

As stated by the Third Circuit in *Stephens*, discussed *supra*, it is well established that:

> To make out a prima facia case, public employees who claim that they suffered from an adverse employment action based on their exercise of a constitutional right must show:
>
> 1. He/she worked for a public agency in a position that does not require a political affiliation.
>
> 2. He/she was engaged in constitutionally protected conduct;
>
> 3. The conduct was a substantial or motivating factor in the government's employment decision.

Id. at 176 (citing *Robertson v. Fiore*, 62 F.3d 596, 599 (3d Cir 1995)). Before any burden would have shifted to Respondents, Petitioner would have had to show that his mayoral campaign was a "substantial motivating factor" in the promotions of highly qualified firefighters Mooney and

Tamburella. *Id.* Despite Petitioner's representation that he "submitted the evidence of political discrimination from the onset," and that he "met his burden of proof," the District Court concluded otherwise and ended its inquiry prior to shifting the burden to Respondents. (Pet. 8). Not only was Petitioner's campaign not "a substantial motivating factor," but the District Court found that Petitioner had "no evidence that any action was taken against him" as a result of his campaign.

The Third Circuit has held that once an employee makes the demonstration of the first three prongs of the test, "the employer may avoid a finding of liability by proving by a preponderance of the evidence that the same employment action would have been taken even in the absence of the protected activity." *Id.* (other citations omitted). A prima facie case must be established before the fourth prong, or burden shifting mechanism, is ever reached. Petitioner's argument that the test employed by the Third Circuit "makes it easier for the defendant to escape liability," not only misrepresents the state of the law, but incorrectly applies the facts of the within case to well established case law. (Pet. 7).

Absent any demonstration, let alone a prima facie case, the District Court was able to end its inquiry and dismiss Petitioner's claim. Contrary to Petitioner's claim that "[t]he lower courts are unsure how to weigh evidence of political discrimination cases versus other employment discrimination cases," the District Court in the instant case had no evidence in support of Plaintiff's claim upon which to weigh. (Pet. 8). Absent any scintilla of evidence to support his claims, Petitioner would have this Court believe that the Third Circuit uses an improper burden shifting mechanism

in political discrimination cases. The facts of the within case do not warrant such an analysis.

B. Petitioner Does Not Have Standing to Challenge the Burden Shifting Mechanism Utilized by the Third Circuit in Political Discrimination Cases.

Petitioner is asking the Supreme Court to review the constitutionality of the burden shifting mechanism utilized by the Third Circuit in political discrimination cases where this Petitioner has no evidence of political discrimination. The argument raised by Petitioner stands contrary to the long adhered general principle that one does not have standing to argue the constitutionality of a law applied to third parties in hypothetical situations. *Cty. Ct. of Ulster Cty v. Allen*, 442 U.S. 140, 154, 99 S. Ct. 2213, 2223 (1979). Unlike the First Amendment cases where this Court carved out a limited exception to the general rule regarding standing, Petitioner is not challenging an overly broad statute which may or may not restrict his First Amendment rights. *See Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S. Ct. 2908, 2914, 37 L. Ed. 2d 830 (1973); *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S. Ct. 1116, 1121, 14 L. Ed. 2d 22 (1965).

Petitioner has blatantly misrepresented the factual findings of the District Court by arguing that he has "submitted substantial evidence," and that he "was more qualified for the position" of Battalion Chief. (Pet. 8). The record below confirms the exact opposite is what occurred. Petitioner's misrepresentation of the factual record below does not call for this Court's review.

CONCLUSION

For all the foregoing reasons, it is respectfully requested that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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